

## **Report**

### **Regulatory Powers and Corporate Offences**

Volume 1: Regulatory Powers, Chapters 1 to 7

Volume 2: Corporate Offences, Chapters 8 to 13

(LRC 119-2018)

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The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its Fourth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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## CHAPTER 8

# CORPORATE CRIMINAL LIABILITY

### A. Introduction

8.01 Corporate bodies are legal persons and can commit a wide variety of criminal offences,<sup>1</sup> ranging from summary offences through to indictable offences such as theft, fraud and homicide.<sup>2</sup>

8.02 It can be difficult to apply traditional principles of criminal liability to corporate bodies, because those principles were developed with human beings – natural persons – in mind.<sup>3</sup> There is some uncertainty about the test, or tests, to be applied to determine how corporate entities other than natural persons can be held to account for criminal offences.<sup>4</sup> A number of approaches have been developed in other jurisdictions to attribute criminal liability to corporate bodies, and to comparable commercial undertakings.<sup>5</sup> These are examined below with a view to clarifying how to attribute criminal liability to corporate bodies in the Irish context. The first approach developed was vicarious criminal liability. This was followed by the development of the identification doctrine in the English

<sup>1</sup> See Courtney, *The Law of Private Companies* 2nd ed (Butterworths 2002) at 175; Charleton, McDermott & Bolger, *Criminal Law* (Butterworths 1999) at 910.

<sup>2</sup> See *Report on Corporate Killing* (LRC 77-2005) paragraph 1.02; Gobert and Punch, *Rethinking Corporate Crime* at 8-9.

<sup>3</sup> Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) at 4.

<sup>4</sup> Wells, “Containing Corporate Crime”, in Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) at 23.

<sup>5</sup> In this chapter and Report, the Commission (reflecting much of the literature on this subject) uses the term “corporate body” and “corporate criminal liability” to discuss this area of law. The Commission recognises, however, that in the context of implementing the recommendations in the Report, it may be necessary to consider the criminal liability of other collective undertakings, such as partnerships, which do not, under current Irish law, have a separate legal personality. The Commission is conscious in this respect that a number of existing statutory schemes that provide for corporate criminal liability also include express provision for the criminal liability of unincorporated bodies such as partnerships. This has been achieved by imposing duties giving rise to criminal liability on an “undertaking”, defined to include a corporate body and an unincorporated body: see for example the definitions of “undertaking” in section 3 of the *Competition Act 2002* and section 2 of the *Safety, Health and Welfare at Work Act 2005*. For this reason, while the Commission refers to “corporate” liability, this should not be taken to exclude the application of the recommendations to other undertakings, as provided for in the 2002 and 2005 Acts. Separately, it may be noted that section 18(c) of the *Interpretation Act 2005* provides that where the term “person” is used in legislation, it can be taken to include not only a corporate body but also an unincorporated body of persons, as well as an individual (this is, subject to section 4 of the 2005 Act, which provides that this applies unless a contrary intention appears in specific legislation that uses the term “person”).

courts. Various different forms of an organisational model of corporate liability have also been provided by way of statute.

## 1. The Corporate Body as a Legal Person

- 8.03 A corporation or corporate body is a legal person having a legal identity separate and distinct from its constituent (human being) members. A corporation or corporate body may be corporation sole, in which case it comprises one individual holding an office that has perpetual succession, such as a government Minister under the *Ministers and Secretaries Act 1924*. Alternatively, a corporate body may be aggregate or a collective body, in which case it is constituted by more than one person or single member companies.<sup>6</sup>
- 8.04 The current understanding of a corporate body as a separate and distinct legal entity from its shareholders, formed pursuant to statute, was adopted by the courts in the 19th century,<sup>7</sup> and this separate legal personality of a corporate body is a fundamental feature of commercial law. Corporate bodies, as separate legal persons, also have many of the powers and functions of human beings (natural persons), such as the ability to own property, sue, be sued, and enter into contracts. However, corporate bodies are distinct from natural persons in both their nature and legal treatment. An important application of this is that the corporate body is liable for its own debts, and the directors, managers or shareholders are, in general, not personally liable for its debts. This general rule applies most clearly where the corporate body is insolvent and cannot pay its creditors: in general they cannot sue the directors, managers or shareholders (this is subject to some statutory provisions that provide for the personal civil liability of company directors for fraudulent trading, discussed in Chapter 12, below). Despite their separate legal personality, corporate bodies are artificial constructs who can only function, in reality, through other natural or legal persons.<sup>8</sup> Many areas of law accept that the corporate body is a different type of “person” and treat it differently as a result. For example, corporate bodies receive different tax treatment to natural persons. In addition, a corporate body does not enjoy the same access to constitutional protections as the natural person. Some constitutionally

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<sup>6</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) at 39.

<sup>7</sup> *Salomon v Salomon & Co* [1897] AC 22. See Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 84.

<sup>8</sup> Unlike a natural person, the corporate body is a “perpetual person” which can continue in existence despite the death, bankruptcy, loss of competency, or change in composition of its membership, or transfer of its ownership.

guaranteed rights, such as the right to life and liberty,<sup>9</sup> or the right to marry,<sup>10</sup> have no meaningful application for the incorporeal corporate body.<sup>11</sup>

8.05 While the courts have, to date, not provided a comprehensive analysis of which constitutional protections a corporate body is or is not entitled to, it has been established that a corporate body enjoys certain rights that the natural person also enjoys, such as the right to communicate and earn a livelihood,<sup>12</sup> and the right to a fair trial.<sup>13</sup>

8.06 The focus of this chapter is on the development of a suitable general model to attribute criminal liability to corporate bodies. The discussion and analysis takes account of the separate legal personality of corporate bodies, while also recognising the reality that they operate primarily through the intentions and actions of human beings and through the policies and procedures that senior personnel develop for the corporate bodies.

## 2. The Role of the Criminal Law

8.07 Modern criminal law attempts to reconcile the tension between the moral goal of denouncing activity which is regarded as socially unacceptable, on the one hand, with the utilitarian objective of preventing harm through deterrence, incapacitation and rehabilitation of offenders, on the other.<sup>14</sup>

8.08 One of the objectives of the criminal law is to promote the autonomy of persons within society, by prohibiting others in society from conducting themselves in a manner that unduly infringes upon the autonomy of others.<sup>15</sup> This autonomy can be facilitated by criminalising conduct that results in harm to others, but limiting the application of the criminal law so as not to include conduct that results in only minor harm. This notion of facilitating individual autonomy reflects JS Mill's "harm principle".<sup>16</sup> The Commission has previously noted in the course of this project that "it is essential that the criminal law

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<sup>9</sup> Guaranteed by Article 40.3 of the Constitution .

<sup>10</sup> Identified as a constitutional right in *Donovan v Minister for Justice* (1951) 85 ILTR 134. The right is also given statutory recognition in a variety of legislative provisions.

<sup>11</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 307. A view by the courts that the constitution fully disentitled corporate bodies from certain constitutional protections, such as property rights (see *Private Motorists Protection Society Ltd v AG* [1983] IR 339), has been rolled back on by the courts more recently. See the judgement of Keane J in *Iarnród Éireann v Ireland* [1996] 3 IR 321.

<sup>12</sup> *Attorney General v Paperlink Ltd* [1984] ILRM 373.

<sup>13</sup> *Criminal Assets Bureau v Mac Aviation Ltd* [2010] IEHC 121.

<sup>14</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) at 12.

<sup>15</sup> See Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 23 – 31.

<sup>16</sup> Mill, *On Liberty* (London: John W. Parker and Sons 1859) at 21-22. The "harm principle" requires that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." This principle sets the limits of the criminal law at criminalising only conduct that results in harm to others.

should be used to address only the most serious forms of wrongdoing and that civil and administrative measures are more appropriate for less serious problems.”<sup>17</sup>

- 8.09 The criminal law is not confined to conduct where one individual harms another. It may also extend to limit the ability of individuals to inflict self-harm.<sup>18</sup> Offences such as failing to wear a seat belt, while not harmful to others are used by the State as a practical tool for regulating unwanted conduct.
- 8.10 The autonomy and ability to interact with society granted to a corporate body by law (which grants it separate legal personality), allows the corporate body the opportunity to commit wrongful acts and conduct itself in a manner that harms others. It is important therefore that the State has in place the appropriate legal tools to impose “after the event” criminal liability in such a case. This approach complements the role of regulatory bodies and the application of their regulatory tool box and enforcement pyramid (discussed in earlier chapters), which are aimed more at prevention than criminal liability, although the possibility of criminal liability is clearly an important “fall back” aspect of regulatory powers.
- 8.11 Though the wrongful acts of the corporate body may not always be “as obvious as assault and battery, and can be appreciated readily only by persons who are expert in the occupations in which they occur”,<sup>19</sup> the view that corporate crime (or “white collar” crime) is not as harmful as “street crime” has been eroded. While prosecutions for some corporate-related crime, such as corporate tax evasion, competition offences and occupational safety and health offences occurred in Ireland prior to the economic crisis in 2007, that crisis has led to an increased level of prosecutions<sup>20</sup> and it is now widely perceived that large corporate bodies have the capacity to cause substantial social harm.<sup>21</sup> As discussed in Chapter 1, a number of senior managers in financial institutions have been convicted on indictment on significant fraud offences in recent years. Some of the corporate bodies involved in those trials had already been liquidated due to their hopeless insolvency and had in effect been nationalised. The result was that corporate prosecutions

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<sup>17</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LCR IP 8-2016) at 11.

<sup>18</sup> An example of this use of criminal law is the offence of failing to wear a safety belt, Regulation 5(3) of the *European Communities (Compulsory use of Safety Belts and Child Restraint Systems in Motor Vehicles) Regulations 2006* (SI No.240 of 2006), which is applicable even while a person is alone in their vehicle. This offence is not a manifestation of the “harm principle” as it cannot be said that this person is impinging on the rights of another.

<sup>19</sup> Horan, *Corporate Crime*, (Bloomsbury Professional 2011) at 6, quoting from Sutherland, “Is ‘White-Collar Crime’ Crime?” (1945) 10 *American Sociological Review* 132.

<sup>20</sup> For a greater discussion see McGrath, “Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime” (2012) 22 *ICLJ* 72.

<sup>21</sup> Quaid, “The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis” (1998) 43 *McGill L J* 67, at 80.



of those bodies would have either been in vain or involved imposing (further) financial burdens on the State.

8.12 Regardless of that specific context, this chapter and the following chapter explores the link between corporate liability and the intentions and actions of senior managers. Whether in practice there is a prosecution of one, or both, or neither, will depend on the precise context. It is nonetheless important that the clearest possible model for attributing liability to both should be in place.

8.13 In such circumstances, it is appropriate that the criminal law plays a role in regulating the conduct of corporate bodies. Given the distinct nature of the corporate body (often made up of a collective of other “persons”), the Commission turns to examine the most appropriate model to apply the criminal law to this different type of “person”.

## B. The Development of Corporate Criminal Liability

8.14 Initially, the common law did not provide for corporate bodies to be held criminally liable.<sup>22</sup> In the 17th century, the common law created the doctrine of vicarious liability in the law of tort.<sup>23</sup> However, the common law refused to extend this doctrine to the imposition of criminal liability for an offence, such as a fraud-type offence, that required proof of an intent to commit an offence, the mental element of an offence or “guilty mind” (*mens rea*).<sup>24</sup> This was because, in an observation attributed to Baron Thurlow, an 18<sup>th</sup> century British Lord Chancellor, corporations had no conscience because they had “neither a soul to damn not a body to kick” and they therefore did as they wished.<sup>25</sup> At this point, there was an effective immunity from criminal liability for corporate bodies.

8.15 This immunity began to fade in the middle of the 19th century when the criminal law began holding corporate bodies strictly liable for their omission of a duty, which did not

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<sup>22</sup> Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 90; Coffee, “Corporate Criminal Liability: An Introduction and Comparative Survey” in *Criminal Responsibility of Legal and Collective Entities – International Colloquium* (May 1998) at 13.

<sup>23</sup> This doctrine allowed for a master (which could be a corporate body or a natural person) to be held liable for the conduct of his or her servant where that conduct was done in the course of the servant’s employment. The justification for this doctrine was that the master benefited from the work of his or her servant, and so should carry the detriment resulting from the servant’s conduct. This is the principle of enterprise liability. Vicarious liability was necessary because of circumstances in which the servants were often impecunious, and so compensation for tortious damage would not be forthcoming if liability could not be imposed upon the master. See McMahon and Binchy, *Irish Law of Torts* 4th ed (Bloomsbury Professional 2013) at 1522.

<sup>24</sup> *R v Huggins* (1730) 92 Eng Rep 518.

<sup>25</sup> An early source for this attributed quote is Poynder, *Literary Extracts from English and Other Works* (John Hatchard & Son, 1844), Vol.1, p.268. It was more recently cited in an influential US article, Coffee, “No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 Michigan L Rev 386, at 386, fn1.

require proof of a “guilty mind,”<sup>26</sup> whether common law offences<sup>27</sup> or statutory offences of that type.<sup>28</sup> For these offences, which as noted below are described as strict liability offences, the courts allowed the application of vicarious criminal liability. However, other than for these offences, corporate bodies continued to be immune from criminal liability.<sup>29</sup>

8.16 In England, an eventual move towards making corporate bodies subject to general criminal liability<sup>30</sup> began with the court and legislative recognition that “person” was an “apt word to describe a corporation, as well as a [natural] person” for the purposes of statutory interpretation.<sup>31</sup>

8.17 Following this, criminal offences could generally be applied to corporate bodies in the same manner they could be applied to natural persons.<sup>32</sup> However, it remained the case that the courts had no legal mechanism for attributing to a corporate body the “guilty mind” element (*mens rea*) of offences such as fraud.<sup>33</sup>

8.18 A debate continued as to whether a corporate body could have a “corrupt mind”,<sup>34</sup> or commit “an act of understanding and an exercise of will”,<sup>35</sup> sufficient to satisfy a fault

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<sup>26</sup> *Birmingham and Gloucester Railway Co* (1842) 3 QB 223.

<sup>27</sup> Public nuisance: *Great North of England Railway Co* (1846) 9 QB 315; Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 88; criminal libel: see *R v Holbrook* (1878) 4 QB 42; contempt of court: see *R v Evening Standard Co Ltd* [1954] 1 QB 578.

<sup>28</sup> Coffee, “Corporate Criminal Liability: An Introduction and Comparative Survey” in *Criminal Responsibility of Legal and Collective Entities – International Colloquium* (May 1998) at 13-14.

<sup>29</sup> Coffee, *Ibid.*

<sup>30</sup> See Ashworth, *Principles of Criminal Law*, 5th ed (OUP 2006) at 114; Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 87 and 88; *Great North of England Railway Co* (1846) 9 QB 315, as per Lord Denman CJ at 320.

<sup>31</sup> *Royal Mail Steam Packet Co v Braham* (1877) 2 App Cas 381 (PC) 386. This was the case where the statute did not, in its context or object, indicate any intention to limit the word’s meaning. This legal understanding of “person”, in the context of criminal offences provided by statute, was included in section 14 of the UK *Criminal Law Act 1827*. The courts began to make extensive reference to this understanding of “person” following its inclusion in the UK *Interpretation Act 1889*. Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 86. Section 2(1) of the UK *Interpretation Act 1889*, which applied to Ireland, provided: “In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression ‘person’ shall, unless the contrary intention appears include a body corporate”. As noted in fn5, above, this remains the case under section 18(c) of the *Interpretation Act 2005*.

<sup>32</sup> As a matter of common law (see *Royal Mail Steam Packet Co v Braham* (1877) 2 App Cas 381, at 386) and statutory interpretation (see section 18(c) and (j) of the *Interpretation Act 2005*), corporate bodies, in general, have the same capacity to commit criminal offences as natural persons.

<sup>33</sup> The courts could apply absolute liability offences to companies via vicarious liability.

<sup>34</sup> *R v Great North of England Railway Co* (1846) 9 QB 315; see also the judgment of Finlay J in *R v Cory Brothers & Co* [1927] 1 KB 810, in which he followed *R v Great North of England Railway* in holding that an indictment containing a count of manslaughter could not be maintained against the corporate body, as the body was incapable of having the requisite *mens rea*.

<sup>35</sup> *Case of Sutton’s Hospital* (1612) 77 Eng Rep 960.

requirement of a criminal offence.<sup>36</sup> Despite the corporate body being recognised as having legal personality, it did not (echoing the aphorism attributed to Lord Chancellor Thurlow in the 18<sup>th</sup> century, discussed above) have a body with which to commit the conduct element of a crime (the *actus reus*), or a “mind” similar to that of a natural person, capable of forming the knowledge or intent required to satisfy the fault element of a crime (the *mens rea*).<sup>37</sup>

8.19 A method of attributing a specific “state of mind” to a corporate body was eventually outlined in a civil liability case, *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co*.<sup>38</sup> This case laid down the “directing mind and will” principle, also referred to as the identification doctrine. This doctrine provides that, as the corporate body is an abstraction having no mind or body of its own, its “directing will” must be imputed from one of its agents at the centre of the body’s personality, who is the “directing mind and will” of the corporate body.<sup>39</sup>

8.20 From the 1940s onwards, the English courts became increasingly willing to attribute to the corporate body the criminal acts and states of mind of senior managers, directors and other corporate officers with decision-making authority.<sup>40</sup> The development of the identification doctrine will be considered in greater detail below.

8.21 The US courts followed a different path. Rather than developing a new doctrine to overcome the difficulty in attributing intention or knowledge to a corporate body as the English courts did, the US federal courts focused on broadening the application of the vicarious liability doctrine to hold corporate bodies liable for personal fault type

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<sup>36</sup> Part of the reasoning behind the argument that personal fault type offences could not be applied to a corporate body was because such offences had not been developed with the corporate body in mind. Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 73, argued that the contemporary criminal law is a product of political liberalism, which focused on the values of the individual person, rather than on the values of any collective.

<sup>37</sup> The logic behind these views was supported by the fact that many of these types of offences attracted sanctions of imprisonment or even death, which do not apply to a corporate body. See Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 90.

<sup>38</sup> *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co* [1915] AC 705. This case concerned an action under a statutory regime, which provided a defence where the defendant could prove that “any loss or damage happened without his actual fault or privity” (section 502 of the UK *Merchant Shipping Act 1894*).

<sup>39</sup> *Ibid.* at 713 (Viscount Haldane).

<sup>40</sup> For example, see *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146. The identification doctrine applied in prosecutions for common law offences as well as statutory offences that expressly applied to the broader interpretation of “person” (which included the corporate body): See *R v ICR Haulage Ltd* [1944] KB 551.

offences.<sup>41</sup> This resulted in the development of the doctrine of *respondeat superior*,<sup>42</sup> which will be discussed in further detail below.

## 1. Ingredients of a modern crime: fault, no-fault and conduct elements

### (a) The fault element of a crime

8.22 Generally, the criminal law traditionally did not seek to impose liability upon a person who is not either morally blameworthy or in some other way at fault for some criminal conduct or result. This was a general rule, which involved a presumption of a requirement to prove knowledge or intention, the “guilty mind”, in order to convict a person. The presumption could be overcome, especially in the case of statutory criminal offences, by clear language indicating that the offence did not require such proof and was committed by conduct elements only, for example, pollution or speeding offences. Indeed, many modern statutory criminal offences, notably those with a corporate element, are conduct-type offences. To reflect this, the criminal law has developed different categories of culpability that an offence may require of a person in order for that person to accrue liability.<sup>43</sup> These levels of culpability can be broken into three types: subjective fault, objective fault, and no-fault (strict liability and absolute liability). This categorisation of criminal offences, which originated in Canada, was adopted by the Supreme Court in *Waxy O’Connors Ltd v Riordan*,<sup>44</sup> and is discussed in further detail in Chapter 10, below.

8.23 In the case of a subjective fault offence, the culpability of the defendant will be determined based upon the actual knowledge, beliefs or intentions of the defendant. The degree to which the defendant’s conduct falls short of objective, community, norms is not relevant. This type of fault is divided into 2 different (descending) levels of culpability, which are used throughout the criminal law:

- (1) intention/knowledge;
- (2) subjective recklessness/wilful blindness.<sup>45</sup>

8.24 In the case of an objective fault offence, the culpability of the defendant is determined based upon that defendant’s behaviour as judged against a community standard. Here,

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<sup>41</sup> The US courts began to recognise corporate liability for offences that did not require proof of a fault element (*mens rea*) around the same time as the English courts. See *Commonwealth v Proprietors of New Bedford Bridge* (1854) 68 Mass. 339.

<sup>42</sup> Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 85.

<sup>43</sup> For a discussion of the history and development of criminal fault, see McAuley & McCutcheon *Criminal Liability* (Round Hall Dublin 2000) Chapter 6.

<sup>44</sup> [2016] IESC 30.

<sup>45</sup> For a more detailed discussion of these levels of culpability, see the discussion on the culpability of agents in Chapter 9.

the actual knowledge, beliefs or intentions of the defendant are not relevant. This type of fault can also be divided into different (descending) levels of culpability, including:

- (1) gross negligence (falling far below an objective standard of care, whether in manufacturing or services);
- (2) simple or ordinary negligence (falling below an objective standard of care)/unreasonableness/breach of statutory requirement to do what is reasonably practicable/failure to prevent a reasonably foreseeable outcome.<sup>46</sup>

8.25 In the case of no-fault offences, which are divided into strict liability and absolute liability offences, liability may be imposed based simply on the voluntary commission of criminal conduct, without requiring proof of subjective criminal fault. The key difference between these no-fault offences is that a strict liability offence is subject to a due diligence defence (discussed in Chapter 10, below), whereas an absolute liability offence, such as failure to file an annual return for a company or driving over the speed limit, carries no such defence.

8.26 Objective fault is necessarily a less personal form of culpability than subjective fault, as it does not require actual advertence to the wrong on the part of the defendant. It is generally less difficult to prove than subjective fault. As such, objective fault can be seen as a lower level of culpability than subjective fault.<sup>47</sup> Offences that do not require any proof of any fault (strict liability and absolute liability offences) are still more remote from the personal culpability of a defendant, and even less arduous to prove, and so require the lowest level of culpability.

8.27 Irish criminal law frequently allows for the imposition of criminal liability on a corporate body through objective<sup>48</sup> or no-fault<sup>49</sup> offences. Indeed, the overwhelming majority of criminal offences in the statutory regimes of the financial and economic regulators encompassed by this Report, discussed in the preceding chapters, involve either objective or no-fault offences. As will be seen below, the case law suggests that such statutory offences involve direct, personal, attribution of liability onto the corporate bodies, often because the legislation provides expressly for imposing direct duties on the corporate bodies. In that respect, such offences have not posed particular problems in terms of attributing criminal liability directly onto the corporate body, which is evidenced by the considerable number of criminal prosecutions brought to conviction on corporate bodies under such statutory provisions. By contrast, the case law discussed below also indicates

<sup>46</sup> See the discussion on culpability of agents in Chapter 9.

<sup>47</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 113.

<sup>48</sup> See *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338; *The People (DPP) v Oran Pre-Cast Ltd* Court of Criminal Appeal 16 December 2003. English case law is to the same effect: see *R v Chargot Ltd* [2008] UKHL 73, [2009] 1 WLR 1; *R v Associated Octel Ltd* [1996] 1 WLR 1543.

<sup>49</sup> See *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267; *Waxy O'Connors Ltd v Riordan* [2016] IESC 30.

that there is considerable uncertainty as to the test, or tests, to be applied to determine how a corporate body – a collective entity - can meet the “more personal” subjective fault standard in offences such as those involving theft or fraud. While a number of the different models considered below set out mechanisms for attributing objective and subjective fault (these are termed “combined approaches”), other models are solely designed to provide a means of attributing subjective fault to the corporate body. This reflects recurrent difficulties that surround the attribution of subjective fault to corporate bodies in common law jurisdictions. The nature of fault attribution catered for by each model will be considered below.

### **(b) The conduct element of a crime**

8.28 It is a fundamental aspect of the criminal law that a person may not be held criminally liable based upon his or her culpable mental state or objective fault alone. The fault element of an offence must be accompanied by some conduct on the part of the person. Though there are certain exceptions to the rule that criminal liability cannot be imposed without proof of criminal culpability (strict/absolute liability offences), there is no exception to the requirement that some form of wrongful conduct done by (or, in limited circumstances, on behalf of) a person must be proved in order for criminal liability to be imposed on that person.

8.29 The criminal law, in general, provides that the conduct element of a criminal offence may target three different elements of conduct:

- (1) a criminal act or, in some circumstances, an omission – for example, the offence of rape<sup>50</sup> criminalises the act of having non-consensual sexual intercourse with a woman, and many offences involving corporate bodies, such as failure by a financial service firm to ensure the maintenance of adequate capital ratios;
- (2) an act, or in some circumstances an omission, which has brought about a criminal result – for example, the offence of murder<sup>51</sup> will only be committed if some conduct on the part of the defendant causes the death of another person; and, equally, some corporate offences may require a certain result to follow, for example in some (though not all) theft and fraud offences (see the discussion in Chapters 11 and 12, below);
- (3) the conduct element of an offence can also require that either of these first two forms of conduct must have taken place in the context of a specific circumstance or state of affairs – for example, a corporate body employing a person under 18 in certain specified circumstances.<sup>52</sup>

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<sup>50</sup> Section 2(1) of the *Criminal Law (Rape) Act 1981*.

<sup>51</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* at 47.

<sup>52</sup> *Protectin of Young Persons (Employment) Act 1996*.

- 8.30 Criminal offences often include a mix of these different elements. The conduct element of the offence of arson<sup>53</sup> requires the defendant to act upon property with fire, resulting in damage to property, in circumstances where the defendant does not have lawful excuse to so act and does not own the property. Equally, it is possible, though rare,<sup>54</sup> for offences to include only one of these elements. The offence of being in charge of a vehicle while under the influence of intoxicants<sup>55</sup> does not require proof of either an act, or a particular result, but only the existence of a particular state of affairs.
- 8.31 In addition to requiring conduct in the form of some or all of the above three conduct types, it is also an essential requirement of the conduct element of any offence, that the defendant's conduct was voluntary.<sup>56</sup>
- 8.32 Traditionally, the courts have chosen to distinguish positive acts and omissions as two different forms of conduct, deserving of different treatment by the criminal law - that is, the courts have been generally reluctant to criminalise conduct in the form of an omission. This rationale has been justified, firstly, because a failure to act is distinct in its nature; it cannot, in and of itself, bring about a result in the same way in which a positive act can.<sup>57</sup> Secondly, it is argued on policy grounds that, were a failure to act generally capable of satisfying the conduct element of offences in the same manner as positive conduct, this would have the effect of imposing a general and onerous duty upon persons to act to prevent others coming to harm. Such a duty would be an unwarranted infringement upon individual autonomy.<sup>58</sup>
- 8.33 Despite these arguments against allowing for omissions to satisfy the conduct element of offences, the criminal law does allow for omissions to be criminalised in certain circumstances, such as where, as already noted, a corporate body acting as a financial services provider has failed to maintain adequate capital ratios.<sup>59</sup>
- 8.34 The nature of the corporate body as a non-corporeal legal person means that any conduct on the part of such a person (barring omissions) must be performed on its behalf by an agent. Unlike in the case of the natural person, it can never be the case that the corporate body will have directly committed a positive act.

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<sup>53</sup> Section 2 of the *Criminal Damage Act 1991*.

<sup>54</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 53.

<sup>55</sup> Section 5 of the *Road Traffic Act 2010* expressly provides that a defendant need not be driving, or have attempted to drive the vehicle in question.

<sup>56</sup> For a comprehensive consideration of voluntariness, see McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at 133-163.

<sup>57</sup> Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 111.

<sup>58</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 72.

<sup>59</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 84-90 provide a list of such circumstances: the duty of parents towards children; a duty voluntarily assumed; where a person has created a danger, there may be a duty to minimise the harm caused by the danger; a duty under contract; and a statutorily imposed duty.

- 8.35 In relation to an act-based offence, the criminal law will generally require proof that the defendant in question committed the criminal act.<sup>60</sup> For a defendant to be held liable for a result based offence, it must be proved that the defendant's conduct (whether an act or omission) caused the criminal result. Causation will always be a fact in issue in such cases.<sup>61</sup>
- 8.36 In relation to act or result forms of offences, which comprise the vast majority of criminal offences (strict liability and absolute liability offences), the fact that the corporate body must act through a natural person, who will generally be an autonomous actor in his or her own right, creates a conceptual difficulty in attributing responsibility for an act or result to the corporate body. Circumstances or state of affairs conduct elements may exist externally to the conduct of a defendant; however, as with all forms of conduct element, a defendant must conduct himself or herself voluntarily in engaging in the offending state of affairs. In the case of the corporate defendant, this voluntariness would, again, have to manifest itself through an agent.
- 8.37 The area of criminal causation has been criticised as being vague and uncertain regarding the exact scope of the principles to be considered in its application.<sup>62</sup> However, a certain set of guiding principles can be distilled regarding the issue of whether a defendant is responsible for the criminal result. This is usually framed as the question of "legal causation".
- 8.38 The starting point for determining whether a defendant is responsible for a criminal result is the "but for" test: would the criminal result have occurred but for the conduct of the defendant. If the answer is "no" the defendant does not satisfy this test and, he, she or it cannot be responsible for the criminal result. However, merely because the defendant satisfies the "but for" test will not conclusively determine whether the defendant is responsible for the criminal result.<sup>63</sup>
- 8.39 The "but for" test operates alongside the *de minimis* rule. This rule provides that, so long as the defendant's conduct contributed to the criminal fault in more than a minimal way, the defendant can be held responsible for that result.<sup>64</sup> If the defendant's conduct only

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<sup>60</sup> The doctrine of innocent agency, described in chapter 9, footnote 17, allows the conduct element of an offence to be committed by a defendant through an innocent agent.

<sup>61</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 90.

<sup>62</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 104, following a review of case law in this area, it is noted that "[t]here are no fixed rules as to the determination of legal causation, merely principles which guide the courts in their decisions." McAuley & McCutcheon, *Criminal Liability* (2000 Round Hall) at 270 argue that "it is impossible to extract a coherent set of principles".

<sup>63</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 91 give the example of innocently inviting a person to dinner. On the way to that dinner, the invitee is run over and dies. This death would not have occurred "but for" the invitation, but it cannot be said that the act of invitation caused the death in question.

<sup>64</sup> *The People (DPP) v Davis* [2001] 1 IR 146.



contributes in a negligible way to the result, the defendant is not responsible for that result.<sup>65</sup>

8.40 The final general principle that the courts take into account in determining legal causation is that the defendant's conduct must be an operative cause of the result.<sup>66</sup> Hart and Honoré give the example of a defendant handing a child a loaded gun, which the child drops and injures his foot. The defendant's conduct does causally lead to the child's injury (it satisfies the "but for" test), and it does more than minimally contribute to the child's injury. Additionally, it is arguable that the defendant is culpable in his conduct, as it may be negligent to hand a child a loaded gun. However, the risk that made the conduct negligent (the risk of the child shooting the gun, resulting in harm), is not the operative cause of the harm which befell the child.<sup>67</sup> As such, the defendant is not responsible for the resultant injury.

8.41 Being responsible for an operative cause of a criminal result does not mean that the defendant's conduct need be the only cause of the result. So long as the defendant's conduct is an operative and more than minimal contribution to the result, the result can be attributed to the defendant. This attribution can apply even though another person may be responsible for another operative cause. This is the case even if the intervening conduct is substantial in nature and significantly contributed to the overall damage or outcome;<sup>68</sup> if the defendant's conduct would not, if it had been the only cause, been sufficient to bring about the criminal result;<sup>69</sup> and whether the defendant's conduct pre-exists, coincides with, or post-dates any other operative cause.<sup>70</sup>

8.42 While the defendant's conduct need only be one of many operative causes of the criminal result, a defendant will not be responsible for a criminal result where some act, series of acts, or event has intervened to render the defendant's conduct not to be an operative cause of the criminal result (called a *novus actus interveniens*). In such cases, the intervening act or event will have broken the chain of causation.

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<sup>65</sup> For a discussion of "negligible causes", see Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 94; Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 91.

<sup>66</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 104; and McIntyre et al, *Criminal Law* (Round Hall 2012) at 92.

<sup>67</sup> Hart and Honoré, *Causation in the Law* 2nd ed (OUP 1985) at lxiii, discussed in Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 92.

<sup>68</sup> *R v Smith* [1959] 2 QB 35.

<sup>69</sup> *R Warburton* [2006] EWCA Crim 142, at paragraphs 21-23.

<sup>70</sup> For example, in *R v Master* [2007] EWCA Crim 142, where the pre-existing condition of a murder victim was an operative cause of the victim's death from pulmonary embolism, alongside the defendant's act of stabbing the victim.

8.43 An example of such an intervening act is a “free and voluntary act of a third party”.<sup>71</sup> Relying upon traditional principles of legal causation, it is this form of intervening act which may pose the greatest difficulty to the attribution of responsibility for a criminal result to the corporate body, due to the corporate body’s need to act through natural persons, who will generally be voluntary actors.

8.44 Simester and Sullivan give the following example of an intervention by human action:

“A defendant stabs a victim, wounding him fatally, and leaves him for dead. While the prone victim is clinging to life he is happened upon by a third party, an old nemesis, who takes the opportunity to shoot the victim, killing him instantly.”<sup>72</sup>

8.45 In this scenario, the intervening conduct of the third party does not affect the culpability of the defendant’s acts. The fact that the defendant’s conduct did not result in the victim’s death was unforeseeable to the defendant and totally external to him; however, the effect of the ordinary principles of causation are that the defendant did operatively cause the victim’s death, and so is not legally responsible for that criminal result. The intervening conduct of the third party rendered the defendant’s conduct insufficiently proximate (or overly remote).

8.46 Simester and Sullivan have identified a general principle regarding the traditional principles of causation and third party intervention. A third party’s intervention will break the chain of causation where it is “a free, deliberate and informed human intervention”.<sup>73</sup> Where the third party knowingly intervenes to bring about the criminal result, without his or her conduct being “induced, fettered, or constrained by the situation which [the defendant] has created.”<sup>74</sup> The traditional principles of causation do cater for certain situations where criminal conduct is performed by a natural person on a corporate body’s behalf without breaking the chain of causation. However, these circumstances are exceptional, and only arise in cases where the natural person is not sufficiently exercising his or her free will, such as in cases in which that free will has been overborne by the corporate body.<sup>75</sup> Williams outlines the scope of when a natural person’s act might break the causal chain under these traditional principles, in a scenario which is very relevant to the corporate context:

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<sup>71</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 107.

<sup>72</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 96.

<sup>73</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 96 – 104.

<sup>74</sup>*Ibid.* at 96.

<sup>75</sup> *R v Kennedy (No. 2)* [2007] UKHL 38; [2008] 1 AC 269, supports this principle and notes a number of these examples: minors who lack legal capacity to commit a crime, persons who have acted involuntarily, persons operating under duress, persons acting by reason of necessity, and persons acting on foot of a deception or mistake (see paragraph 14).

“I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it [...]. Your volitional act is regarded [...] as setting a new ‘chain of causation’ going, irrespective of what has happened before.”<sup>76</sup>

- 8.47 It is foreseeable that there will be situations in which a corporate agent’s criminal conduct will not be “free, deliberate and informed”, perhaps due to that agent not being aware of relevant facts, and so the agent’s intervention is innocent.<sup>77</sup> However, it is equally foreseeable that there will be situations where the agent is acting both autonomously and on behalf of the corporate body. It is in such situations that the strict application of the traditional principles of causation may provide the corporate body with a defence.<sup>78</sup>
- 8.48 As noted above, the guiding principles that have been discussed do not have the status of hard and fast rules.<sup>79</sup> Vagueness in the principles of causation, and the potential for injustice if the principles considered above are applied overly strictly,<sup>80</sup> has resulted in the courts demonstrating a willingness to take a flexible “common sense” approach to the application of these principles. This is particularly the case when the question of labelling intervening acts as breaking the chain of causation may result in injustice.<sup>81</sup>
- 8.49 However, while this flexibility avoids the difficulties that might be generated by strict application of a general rule, it leads to uncertainty regarding when conduct may be attributed from an agent to the corporate body. It has been pointed out that corporate

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<sup>76</sup> Williams, “Finis for Novus Actus?” [1989] CLJ 391, at 392.

<sup>77</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 98. Also, again see the description of the doctrine of innocent agency in chapter 9, footnote 17. The conduct of the agent will still break the chain of causation leading to the corporate body in circumstances in which that conduct was unforeseeable and is independent of the wrongdoing of the corporate body.

<sup>78</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Hart 2016) at 101 note that the gap in the law that results from the inability to attribute the deliberate conduct of a third party to a defendant who has culpably contributed to the third party’s conduct is filled by secondary and derivative liability doctrines (as examined in chapter 9). However, this gap poses a greater difficulty to corporate bodies, as it has the potential to prevent the imposition of primary liability in all cases that require positive conduct leading to a criminal result. Carolan, “Criminalizing Corporate Killing; the Irish Approach” (2011) 41 *Stetson Law Review* 157, at 169.

<sup>79</sup> The criminal law has displayed an ability to ensure that liability is imposed upon a corporate body (even though the act or result based conduct elements of offences must be committed on the body’s behalf by an agent or employee), by demonstrating a resistance to imposing the traditional doctrine that would characterise the agent’s conduct as a voluntary intervening act (*novus actus interveniens*). See Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at 61; McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at 270-271.

<sup>80</sup> McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at 271.

<sup>81</sup> *Ibid.* at 270-271.

bodies will be both highly motivated and well placed to exploit any such uncertainty, in order to try to avoid liability.<sup>82</sup>

8.50 The courts' "common sense" approach to causation means that corporate bodies have not generally been able to escape liability through technical causation arguments.<sup>83</sup> However, the lack of certainty in the current legal position is clearly undesirable.

8.51 The courts have also not demonstrated any difficulty in attributing conduct by way of an omission to a corporate body.<sup>84</sup> The capacity to attribute this form of conduct is not surprising. Attributing a failure to do something or achieve some result to a corporate body can be done directly; there is no need to attribute the omission to the corporate body from one of its natural person agents. The requirement that positive acts be performed on behalf of the corporate body by separate and, generally, autonomous natural persons does not arise in relation to omissions.

8.52 Some of the corporate criminal liability models considered in this chapter expressly provide for the means by which the conduct element of an offence can be attributed to the corporate body. Other models only deal with the issue for attributing fault to the corporate body, leaving the question of conduct attribution to the existing causation principles. The conduct attribution issue will, nonetheless, be considered in relation to each model considered.

## **2. The Nature of Decision-Making in the Modern Corporate Body**

8.53 In a modern corporate body, certainly in a large entity, corporate policy-making and other significant decision-making is not always determined by a single person such as the chief executive officer (CEO). While the CEO may have a significant role in this respect (and the person where ultimate authority and responsibility resides), most policy and decision-making is delegated to responsible functional managers. In manufacturing, this would include, for example, production managers or quality assurance managers. In services, this would include financial controllers and risk-appetite managers. In that decision-making setting, a draft corporate policy document might originate with an individual and then be reviewed by a working party or a committee, then by senior management, including the CEO, and in some cases by a board of directors or equivalent in a statutory corporate body before it becomes official corporate policy. The persons responsible for drafting and initially reviewing policy are unlikely to be the same persons whose approval is needed to bring the policy into force or the persons who will be assigned the task of implementing the policy. Against the reality of that corporate decision-making, the question that arises, in terms of corporate criminal liability, is on what basis can it be decided that the

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<sup>82</sup> Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 126.

<sup>83</sup> *Re William C Leitch Bros Ltd* [1932] 2 Ch 71; *R v IRC Haulage Ltd* [1944] KB 551.

<sup>84</sup> *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338; *The People (DPP) v Oran Pre-Cast Ltd* (Court of Criminal Appeal 16 December 2003).

corporate body committed an offence. There is a related question, discussed in Chapter 9, below, as to how and whether any of the natural persons involved in corporate decision-making should be charged when the policy leads to a criminal offence.<sup>85</sup>

- 8.54 As noted briefly above, the identification doctrine was the answer the courts of England and Wales provided to this question. Using this doctrine, the courts attempted to underpin the imputation of fault onto the corporate body, by ascribing human attributes to it. For example, in a company regulated by the Companies Acts, the board of directors was its “directing mind and will” and could provide the subjective intention, knowledge or recklessness requirement of the offence. This doctrine was based on a view that the board of a company was, in essence, its “brain”, and the employees who act on behalf of the company were its “hands”.<sup>86</sup> This fiction allowed the courts to attribute direct criminal liability to the corporate body.
- 8.55 Unfortunately, as will be seen below, this approach has proved overly simplistic and not fit for all purposes when considering many modern corporate structures (if it was ever truly a faithful analysis of the decision-making processes of a corporate body). Since the identification doctrine was first set out,<sup>87</sup> there has been an evolution in the complexity and structure of corporate bodies. In the late 19th and early 20th centuries, the corporate body was used as a tool for enterprise, often owned and operated by one entrepreneur.<sup>88</sup> With this simple structure being common for large parts of the early 20th century, the use of the all-powerful “entrepreneur” as the “mind and will” of the company, and the perception of the employees as “hands” made a certain amount of sense.
- 8.56 The nature of the corporate body has evolved, however. It is now common to see a corporate structure in which the ownership of the company by its shareholders is completely divested from the company’s day-to-day running. The daily management of any large corporate body is unlikely to be done by a single “entrepreneur”, but rather by a professional group of senior managers, directors and other corporate officers, often recruited for their specific qualifications and/or experience.<sup>89</sup> This decision-making group, sometimes referred to as the “high managerial agents” of the corporate body, is not arranged in a simple pyramidal structure headed by an all-powerful individual. In a modern public company, for example, management “knowledge and control is

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<sup>85</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 79.

<sup>86</sup> *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, see Lord Denning’s judgment at 172.

<sup>87</sup> *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co* [1915] AC 705.

<sup>88</sup> Quaid, “The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis” (1998) 43 McGill LJ 67, at 77; Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 877, at 853.

<sup>89</sup> Quaid, *Ibid.*

disaggregated: corporate goals are the responsibility of a large number of individuals who may not know what other individuals are doing.”<sup>90</sup>

- 8.57 This move towards the disaggregation of knowledge and control in modern corporate bodies is continuing to be driven by a number of factors, including by the benefits of decentralised decision-making to corporate efficiency.<sup>91</sup> As global markets evolve, they become more complex and the technical skills and knowledge required to make business decisions becomes more specialised. The decentralisation of decision-making to specialised senior managers allows for greater corporate efficiency. It appears, from a financial and operational outcome perspective, that best practice in corporate decision making requires that decisions are not made by individuals or small groups. Instead decisions are best made by more dispersed groups and processes, incorporating advice and discussion from different (and differently skilled or experienced) sources, and by applying pre-set and objective criteria that are necessarily external to any decision maker’s subjective intent, knowledge or recklessness. Best practice in corporate decision-making requires that it takes place at an organisational level.<sup>92</sup>
- 8.58 It is not only best practice, competitive benefits, and a response to the complex nature of global markets, that drive the move towards more decentralised and organisational models of decision making in corporate bodies. Even before the emergence of the financial crisis of 2008, there has been a significant increase in the number and burden of legal and regulatory requirements placed on corporate bodies in Ireland to adopt less centralised decision-making processes.
- 8.59 As noted in Chapter 1, failures in corporate governance in financial institutions, leading to bad decision making, are widely seen as contributing factors to, or associated factors with, the financial crisis that emerged in 2008, and financial failure in general.<sup>93</sup> Indeed, poor corporate governance and related poor policy decision-making and risk-taking have been

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<sup>90</sup> Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 38.

<sup>91</sup> Steven L. Schwarcz, “Excessive corporate risk taking and the decline of personal blame” (2015) 65 *Emory L J* 533-580; also see Malone, “Making the decision to Decentralize” (29 March 2004) Harvard Business School: Working Knowledge, available at <http://hbswk.hbs.edu/archive/4020.html>: Decentralisation of corporate decision-making provides “three general benefits: (1) it encourages motivation and creativity; (2) it allows many minds to work simultaneously on the same problem; and (3) it accommodates flexibility and individualisation.”

<sup>92</sup> Based upon a 2009 survey carried out by global managing consultancy firm, McKinsey & Company. The results of this survey were outlined in two journal articles: Garbuio, Lovallo and Viguerie, “How companies make good decisions: McKinsey Global Survey Results”, *McKinsey Quarterly* (volume January 2009); and Dye, Sibony and Truong, “Flaws in strategic decision making: McKinsey Global Survey results”, *McKinsey Quarterly* (volume January 2009).

<sup>93</sup> See the discussion in Chapter 1 of Regling and Watson, *A Preliminary Report on The Sources of Ireland’s Banking Crisis* (May 2010) PUB00168, at 29: “Errors of judgement in bank management and governance contributed centrally to Ireland’s financial crisis”; Honohan Report, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008* (May 2010) PUB00075, at 54 – 57. Arising from this analysis, see also European Banking Authority, *Guidelines on internal governance under Directive 2013/36/EU* (EBA/GL/2017/11 September 2017) at 5.

identified in numerous reviews of other corporate-related disasters. This included the findings of the UK Sheen judicial inquiry into the sinking of the *Herald of Free Enterprise* ferry in the 1980s, discussed below. The G20 and OECD have defined corporate governance as:

“[...] a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”<sup>94</sup>

- 8.60 The recognition of the importance of good corporate governance in preventing poor institutional decision-making, institutional failure, and systematic harm has led to a new focus on robust corporate governance requirements by national regulators, international regulators and international policy institutes.<sup>95</sup>
- 8.61 In Ireland, a corporate body may be subject to different corporate governance requirements depending on whether it is a company incorporated in Ireland, a company publically listed on the Irish Stock Exchange, or a corporate body (whether in the private sector or public sector) that provides a service that is subject to a regulatory framework.
- 8.62 The vast majority of corporate bodies operating in Ireland are registered under the *Companies Act 2014*. Mere incorporation under the 2014 Act will not necessarily require a company to adopt a decentralised/organisational decision-making framework.<sup>96</sup> However, should a company wish to be listed on the Irish Stock Exchange, it will be required to abide by corporate governance requirements laid out in the *UK Corporate Governance Code*.<sup>97</sup>

<sup>94</sup> G20 and OECD, *Principles of Corporate Governance* (September 2015) at 9. The Central Bank of Ireland, *Consultation on the Review of the Corporate Governance Code for Credit Institutions and Insurance Undertakings* (CP 69 2013), defined corporate governance, at 19, as “[p]rocedures, processes and attitudes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision making.”

<sup>95</sup> Aside from the G20 and OECD Principles of Corporate Governance, the Committee of Sponsoring Organizations of the Treadway Commission (COSO), an industry organisation led by US accountancy bodies, representatives of industry, and the New York Stock Exchange, has issued an *Internal Control – Integrated Framework* (2013), which is designed to be a route map for an internal control structure which can be adopted by any organisation.

<sup>96</sup> Part 4 of the *Companies Act 2014* outlines certain corporate governance requirements that apply to companies incorporated in Ireland. Many of the provisions of the 2014 Act will, by default, become the rules by which the internal management of the company will be conducted; however, these provisions are not mandatory. Many of these provisions can be expressly dis-applied by the company in its constitution. The corporate governance requirements set out in the *Companies Act 2014* are relatively limited.

<sup>97</sup> The Listing Rules of the ISE require that this Code must be applied on a “comply or explain” basis, which allows corporate bodies flexibilities in how they apply the corporate governance requirements. However, if the body is found to have failed to comply with the requirement they must explain the rationale behind this non-compliance. The Code requires that there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company’s business.

The Code requires, for example, that no one individual should have unfettered powers of decision.<sup>98</sup>

- 8.63 Additionally, the Code places an obligation on the board of a listed company to ensure that operational decisions are not made purely subjectively by a single “controlling mind”, but are subject to sound risk management and internal control systems and policies.<sup>99</sup>
- 8.64 Should a corporate body operating in this jurisdiction conduct business in a market regulated by the Central Bank of Ireland, it will likely be subject to further corporate governance requirements. For example, banks, insurance companies and other credit institutions and investment firms operating in Ireland will be subject to detailed corporate governance and decision-making requirements under the *Central Bank Acts and the related EU-derived regulatory regime developed since the economic crisis that emerged in 2008, including for example the Capital Requirements Directive IV (CRD IV)*.<sup>100</sup> The Central Bank has also issued, under the relevant legislation, a series of statutory codes and guidance documents, which include detailed corporate governance requirements, such as the delegation of functional responsibility for specific risks to designated risk officers. As noted in Chapter 2, above, in 2018 the Central Bank published a *Behaviour and Culture Report*,<sup>101</sup> which identified shortcomings in this respect, and which also proposed the introduction of an Individual Accountability Framework that would apply to banks and other regulated financial service providers. It is clear, therefore, that this remains a developing and ongoing area of corporate regulation.
- 8.65 The purpose of such corporate governance rules is to help avoid excessive risk-taking by individual institutions, and to prevent the accumulation of excessive risk in the financial

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<sup>98</sup> *The UK Corporate Governance Code* (Financial Reporting Council April 2016), principle A.2.

<sup>99</sup> *Ibid.* principle C.2; UK Financial Reporting Council, *Guidance on Risk Management, Internal Control and Related Financial and Business Reporting* (September 2014) at paragraph 28, notes that these systems “encompass the policies, culture, organisation, behaviours, processes, systems and other aspects of a company [...]”

<sup>100</sup> *The Capital Requirements Directive IV* (Directive 2013/36/EU) and the accompanying *Capital Requirements Regulation* ((EU) 575/2013) were implemented in this jurisdiction in the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014) and the *European Union (Capital Requirements) (No. 2) Regulations 2014* (SI No 159 of 2014), as has had effect since 31 March 2014. *CRD IV* replaced *CRD III* (Directive 2006/48/EC) which had initially set out corporate governance requirements for credit institutions and investment firms. *CRD IV* includes requirements on regulated entities aimed at increasing the effectiveness of risk oversight by boards, improving the status of the risk management function and ensuring effective monitoring by supervisors of risk governance.

Insurance and reinsurance undertakings are subject to similar internal governance requirements flowing from the *Solvency II* (Directive 2009/138/EC) which has been implemented in Ireland by *European Union (Insurance and Reinsurance) Regulations 2015* (SI No 485 of 2015), and has effect from 1 January 2016; See the Central Bank *Guidelines on Preparing for Solvency II –System of Governance* (2013), guideline 5: “The undertaking should appropriately implement the following key functions: risk management function, compliance function, internal audit function and actuarial function.”

<sup>101</sup> See discussion on Central Bank’s *Behaviour and Culture Report* in Chapter 2.



system.<sup>102</sup> Comparable codes and guidance have also been developed by other financial and economic regulators, which equally aim at preventing inappropriate risk-taking in their respective areas of regulation. While these codes and guidance documents reflected the existing reality of corporate decision-making in many organisations, they are also likely to encourage an acceleration of this existing trend of decentralised corporate decision-making, which is subject to code and guidance-based objective processes.<sup>103</sup>

8.66 Over 90% of active corporate bodies in Ireland are micro-enterprises, employing less than 10 people. This figure rises to 99.7% when small and medium sized enterprises (SMEs), employing less than 250 people, are included.<sup>104</sup> Corporate decision-making in those entities is more likely to be centralised at the apex of a small managerial structure. However, it must be recognised that it is larger corporate bodies, whether financial entities or otherwise, that are likely to present the kinds of systemic risks to the State that arose from the economic crisis that emerged in 2008. In those large corporate bodies (who are also often multi-national bodies), corporate governance and decision making will be driven by international best practice. It will also increasingly be driven by national and international regulatory requirements to have a delegated, decentralised, decision-making process in which decision-making authority, and thus potential criminal culpability (be it subjective or objective in nature), will be dispersed throughout the organisation.

### **3. Perspectives From Other Jurisdictions on Imposing Criminal Liability in the Context of Modern Decision-Making**

8.67 Although the nature of modern corporate bodies has not been considered by the courts in this jurisdiction in the context of attributing subjective fault to corporate bodies, it has been acknowledged in other jurisdictions.

8.68 In the United States, the question as to how corporate criminal liability might be imposed, in circumstances in which no individual employee or agent has the requisite knowledge or intention, was considered in *US v Bank of New England NA*.<sup>105</sup> The US federal First Circuit Court of Appeals answered this question by establishing the concept of collective corporate knowledge:

“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components.

<sup>102</sup> European Commission Press Release, 21 March 2013, available at [http://europa.eu/rapid/press-release\\_MEMO-13-272\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-272_en.htm).

<sup>103</sup> The CRD IV corporate governance rules are supplemented by the European Banking Authority, *Guidelines on internal governance under Directive 2013/36/EU* (EBA/GL/2017/11 September 2017). The Guidelines have been adopted by the Central Bank and must be complied with by all credit institutions regulated by the Central Bank.

<sup>104</sup> CSO, *Consolidated Annual Report on Business in Ireland Abridged 2012*, Small and Medium Enterprise Section, available at <http://www.cso.ie/en/releasesandpublications/ep/p-bii/businessinirelandabridged2012/smallandmediumenterprises/>.

<sup>105</sup> *US v Bank of New England NA* 821 F2d 844 (1st Cir 1987).

The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:

[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.”<sup>106</sup>

8.69 While the *Bank of New England* case accurately describes the nature of decision-making in a modern corporate body, its treatment of knowledge is open to criticism. This case demonstrates an extremely broad interpretation of a concept known as “aggregate fault” which will be considered in more detail below. The effect of this approach is that the corporate body is deemed to have constructive notice of the actual knowledge of its employees, regardless of whether or not this knowledge formed part of the body’s decision-making process, or how reasonable the corporate body has been in its attempts to ascertain the culpable knowledge of its employees. This approach thereby reduces the culpability required of the corporate body, in subjective fault based offences, to something like negligence.<sup>107</sup>

8.70 In the context of the Irish legal system, this broad form of “aggregate fault” may not be appropriate, because the courts have determined that a legal person enjoys similar constitutional fair procedures protections to a natural person.<sup>108</sup> As it seems that this model reduces subjective fault to a form of negligence in a way that would not be constitutionally permissible for natural persons, it could be vulnerable to constitutional challenge in this jurisdiction.

8.71 The Supreme Court of Canada has also recognised the complex and organisational nature of corporate knowledge in that jurisdiction’s leading case on corporate criminal liability, *Canadian Dredge & Dock v R*,<sup>109</sup> in which the Supreme Court noted that:

“[C]ompanies, for example, must of necessity operate by the delegation and sub-delegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by

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<sup>106</sup> *Ibid.* at 856.

<sup>107</sup> Coffee, “Corporate Criminal Liability: An Introduction and Comparative Survey” in *Criminal Responsibility of Legal and Collective Entities – International Colloquium* (May 1998) at 26.

<sup>108</sup> *Criminal Assets Bureau v Mac Aviation Ltd* [2010] IEHC 121.

<sup>109</sup> *Canadian Dredge & Dock v R* [1985] 1 SCR 662.

decentralizing by delegation the guiding forces in the corporate undertaking.”<sup>110</sup>

8.72 In order to determine whether a statutory provision for attributing corporate criminal liability should be introduced in this jurisdiction, and what form such a provision should take, it is necessary to consider how this provision will allow attribution not only to small companies with simple decision-making structures, but also to large corporate bodies that utilise more decentralised organisational decision making processes.

## C. The Different Models of Attributing Corporate Criminal Liability

8.73 In the context of the complex nature of modern corporate decision-making, the Commission now turns to analyse various approaches to corporate criminal liability attribution that have been identified in different jurisdictions. In general, these models are:

- The Strict Identification approach;
- The Rules of Attribution (Statutory Construction) approach;
- The Expanded Identification approach;
- Vicarious/Strict Liability approach;
- Failure to Prevent approach;
- Due Diligence approach;
- Organisational Liability approaches; and
- Other General (Non-Generic and Combined) approaches.

8.74 The above approaches can be used in different ways and incorporated into different types of schemes. Wells, in her appendix to the Law Commission of England and Wales’ *Consultation Paper on Criminal Liability in Regulatory Contexts*,<sup>111</sup> identifies two main types of corporate liability schemes:

- (1) General liability schemes, which are split into two different types:
  - a. Generic schemes: these apply the same attribution model to all offences, regardless of the type of fault requirement contained in the

<sup>110</sup> *Ibid.* at 693.

<sup>111</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 204.

offence. The vicarious criminal liability model of attribution applied at the federal level in the United States is an example of this model of attribution; and

- b. Non-generic schemes (a combined approach): these allow different models to apply to different offence types, depending on the nature of the fault element in the specific offence. The *Canadian Criminal Code* has adopted this approach. Wells argues that the benefit of this type of scheme is that it is relatively simple, but caters for a full range of offence types; and

Offence/legislation specific schemes: generally, these will be statutory offences that are exempted from the application of a general liability scheme, but which provide for their own model of corporate liability. Examples of this scheme are the liability models found in the *Safety, Health and Welfare at Work Act 2005*, and the UK's *Corporate Manslaughter Act 2007* and *Bribery Act 2010*.

8.75 In order for the Commission to recommend what, if any, approach to corporate criminal liability attribution should be adopted in this jurisdiction, it is necessary to consider the nature, advantages and disadvantages of each of these approaches in turn.

## 1. The Identification Doctrine

8.76 The Identification Doctrine has been adopted as a general scheme of attributing criminal liability to a corporate body in a number of common law jurisdictions.<sup>112</sup> The principle behind this doctrine is that there is an individual agent of the corporate body who, due to his or her seniority within the body and their level of influence, acts as the “directing mind and will” of the body. This agent acts as the corporate body and his or her offending conduct and culpable state of mind is imputed onto the corporate body.

8.77 It has been noted that there are few reported Irish cases in which prosecutions requiring proof of a fault element have been taken against corporate bodies.<sup>113</sup> Although it is settled that a corporate body possesses the capacity to commit a crime, including one requiring proof of both subjective and objective fault, the Irish courts have not come out strongly in favour of any particular generally applicable doctrine of corporate criminal liability. The identification doctrine has been applied by the Irish courts in civil actions for damages.<sup>114</sup>

<sup>112</sup> As well as the United Kingdom, the identification doctrine has been applied in Australia (*Hamilton v Whitehead* (1988) 166 CLR 121) and in Canada (*Canadian Dredge & Dock v R* [1985] 1 SCR 662).

<sup>113</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 25.

<sup>114</sup> The identification doctrine as set down in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 was approved by the Supreme Court, in *Taylor v Smith* [1991] 1 IR 142, at 166; and in *Superwood Holdings plc v Sun Alliance & London Insurance plc* [1995] 3 IR 303. Both of these were civil actions for damages. The doctrine was analysed by the High Court (Laffoy J) in *Fyffes plc v DCC plc and others* [2009] 2 IR 417, at 466, where the Court decided not to express a view on whether it was an appropriate doctrine to follow in this jurisdiction.

Whether the identification doctrine is applicable in a prosecution for a fault-based criminal offence has not yet been made clear.<sup>115</sup>

8.78 The Identification Doctrine represents the “conventional” approach to corporate criminal liability in the UK.<sup>116</sup> The doctrine proceeds on two premises:

- (1) the corporate body is an abstraction with no mind of its own with which to satisfy the requisite subjective fault requirements of civil and criminal wrongs;<sup>117</sup> and
- (2) the functions of the corporate body are analogous to a natural person. The organisation is controlled by senior controlling officers, who represent the “mind and will” of the body. The less senior servants and agents of the body are its “hands”, who make manifest those actions directed by the “mind and will”.<sup>118</sup>

8.79 The doctrine has been formulated differently in different jurisdictions, based on these premises. These different formulations shall be considered in turn, followed by cases that exemplify some of the shortcomings of the doctrine.

**(a) The UK Approach: Strict Identification (*Nattrass*)**

8.80 The development of the identification doctrine in the UK courts has swung between two different approaches since the early 1970s. These approaches are the application of the identification doctrine as a generic scheme of liability attribution and the *Meridian* approach, which is discussed below. There was significant historical confusion as to which of these schemes was dominant in England and Wales.

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<sup>115</sup> Though there is an absence of reported decisions on this topic in this jurisdiction, corporate bodies have been successfully prosecuted for fault based offences:

In *the People (DPP) v Big Picture Software Ltd* (Dublin Circuit Criminal Court 30 July 2008, Judge Patricia Ryan), the corporate body defendant was prosecuted for, among other charges, knowingly or wilfully delivering an incorrect VAT Return. The defendant was found guilty of this offence by a jury. See “Liquidated software company fined €140,000 for VAT fraud” (Irish Times 31 July 2008).

In *the People (DPP) v Cappoquin Civil Engineering Ltd* (Dublin Circuit Criminal Court 27 November 2008, Judge Desmond Hogan), the corporate body defendant was prosecuted for, among other charges, knowingly or wilfully delivering an incorrect VAT Return. In this case, the corporate body defendant was not represented in court. It was found guilty of the offence by a jury. See “Waterford firm fined nearly €1m for VAT fraud” (Irish Times 27 November 2008).

Both of these cases are unreported, and it was not indicated in Revenue’s summaries (no longer available online) which model of attribution of liability was applied in each case.

<sup>116</sup> See Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 27-32.

<sup>117</sup> *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, Lord Haldane LC, at 713.

<sup>118</sup> *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, see Lord Denning’s judgment at 172.

- 8.81 The starting point for considering the strict identification approach in England and Wales is *Tesco Supermarkets Ltd v Natrass*.<sup>119</sup> The UK House of Lords acknowledged that the personality of a corporate body is a fiction and that it cannot have knowledge or intention, or be negligent, and a corporate body can only act through a living person. It nonetheless accepted that a corporate body can commit a crime. The House of Lords found that it is a question of law as to whether a natural person who has committed a criminal act is to be regarded as the embodiment of the corporate body (its “controlling mind and will”), or whether that natural person merely acted as a servant or agent of the corporate body. In the case of the latter, only strict or vicarious (indirect) liability could apply to the corporate body, not direct liability.
- 8.82 The common theme expressed in the *Natrass* case was that a corporate body could be held directly liable for an offence committed by a sufficiently senior person within the corporate body, provided this person exercised sufficient power and control over the corporate body.<sup>120</sup> It is by reference to such a person that both the fault element and the conduct element of a relevant offence will be identified and attributed to the corporate body.
- 8.83 The conclusion in the *Natrass* decision was that because the offence in this case was due to the fault of a store manager, who had no policy-related decision-making authority in the corporate body, he was insufficiently senior within the managerial hierarchy of the corporate body to act as the “controlling mind and will” of the corporate body. As such, neither the fault nor the conduct of the store manager could be attributed to the corporate body, and so the body did not commit the offence in question.
- 8.84 The identification doctrine as set out in *Natrass* places the focus of corporate criminal liability attribution squarely on individuals at the apex of the management structure of a corporate body. This limits the circumstances in which liability can be attributed to a corporate body. In *Natrass*, an agent of the corporate defendant (a store manager) had acted with fault. The agent had sufficient control and seniority to perform the offending act (the erection of a misleading poster display). However, the effect of *Natrass* was that this level of control and seniority was insufficient to identify the store manager as the corporate body.

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<sup>119</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153. In this case, a corporate body defendant was being prosecuted for an offence of misleading advertising (pursuant to the UK *Trade Descriptions Act 1968*, comparable to our *Consumer Protection Act 2007*) and sought to rely on two defences: first, a defence of due diligence; and second, that the offence was due to the act of “another person”, the manager of the defendant’s store who had erected a misleading poster display. Both defences were provided for under the Act.

<sup>120</sup> Despite acknowledging the distinction between a senior manager acting as the corporate body, or merely acting on behalf of the corporate body, the House of Lords failed to provide a single clear answer to this question of law - when a natural person is “controlling mind and will” of the corporate body.

8.85 *Nattrass* raises the question as to how an offence could ever be successfully attributed to a large corporate body.<sup>121</sup> Take the offence in *Nattrass*. The control and seniority required to commit the offending conduct (erecting a misleading advertising poster) rested somewhere around the level of the store manager. However, this level of control and seniority was held to be far below the level that would be sufficient to allow the store manager to act as the company. It is unrealistic to assume that the board of directors, the managing director and perhaps other superior officers of the corporate body defendant would ever exercise the function of designing and erecting poster displays in individual stores. As such, it is unlikely that a large corporate body would ever be held liable for an offence such as erecting a misleading poster display. However, the relevant legislation clearly envisaged such an offence.

8.86 The formulation of the identification doctrine as set out in *Nattrass* has led to the observation that:

“One of the prime ironies of *Nattrass* is that it propounds a theory of corporate liability which works best in cases where is needed least [in prosecutions of smaller corporate bodies] and works least in cases where it is needed most [in prosecutions of larger corporate bodies].”<sup>122</sup>

8.87 The identification doctrine as set out in *Nattrass* can therefore be applied successfully to a small organisation where a single controlling mind can usually be identified, but not to a large corporate body typically characterised by dispersed decision-making. Yet, large organisations are exactly the kind of corporate bodies who are likely to pose systemic risks in any State, but may in effect be immune from prosecution if the *Nattrass* form of the identification doctrine is applied. This is the “paradox of size” in the *Nattrass* version of the identification doctrine. This inherent difficulty in *Nattrass* led to a series of cases in the 1990s limiting and qualifying the application of the identification doctrine,<sup>123</sup> and a trend away from the general application of the identification doctrine. This resulted from the realisation by the courts of England and Wales that the doctrine had the capacity to undermine the purpose and intention of rules of law intended to be applied to corporate bodies. The doctrine’s focus on the apex of the management pyramid prevented liability from being imposed where a function of the corporate body, which resulted in a statutory wrong, was committed by a non-senior agent of the corporate body, thereby having the potential to “emasculate legislation.”<sup>124</sup>

<sup>121</sup> For further discussion see Pinto & Evans, *Corporate Criminal Liability* (Sweet & Maxwell 2003) at 57-58.

<sup>122</sup> Gobert, “Corporate Criminal Liability: four models of fault” (1994) *Legal studies* 14 393, at 401.

<sup>123</sup> For examples see *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037; *Director General of Fair Trading v Pioneering Concrete (UK) Ltd* [1995] 1 AC 456; and *R v British Steel plc* [1995] 1 WLR 1356.

<sup>124</sup> See the judgment of Lord Steyn for the Court of Appeal in *R v British Steel plc* [1995] 1 WLR 1356, at 1362 and 1363.

8.88 The judgment of the Court of Appeal of England and Wales in *Tesco Stores Ltd v Brent London Borough Council*<sup>125</sup> highlights this difficulty. The decision concerns the appeal of a prosecution of the corporate body defendant for selling a video-film to a customer under the relevant age rating of the film. The *Nattrass* doctrine was distinguished by the Court of Appeal on the grounds that the statutory provision in *Nattrass* differed in language and content from the provision in question. Although the Court of Appeal did not go so far as to overrule *Nattrass*, it was noted that to apply it in this case would be “absurd”, as it would “suppose that those who manage a vast company would have any knowledge or any information as to the age of a casual purchaser of a videofilm.” The court noted that it must be the knowledge and belief of the employee who conducted the sale that is pertinent to the legislation in question, as to find otherwise would render the statute “wholly ineffective in the case of a large company”. Rather than applying the *Nattrass* doctrine, the court found the defendant vicariously liable based upon the conduct and knowledge of the employee who had conducted the sale.

8.89 In *Director General of Fair Trading v Pioneering Concrete (UK) Ltd*,<sup>126</sup> the UK House of Lords further limited the *Nattrass* doctrine by confining its application specifically to the facts of the *Nattrass* case. Again, in this case, the defendant was held vicariously liable for the wrongdoing of its employees.

**(b) *Meridian*: the Rules of Attribution**

8.90 Following the *Brent* and the *Pioneering Concrete* cases, the identification doctrine had been significantly limited in its application by the Courts, in favour of an attribution model based upon the construction of the legislative provision under which a corporate body was being prosecuted. In *Meridian Global Funds Management Asia Ltd v Security Commission*,<sup>127</sup> the Commonwealth Privy Council took a significant further step in confining the application of the identification doctrine, by holding that an attribution model based upon the construction of the specific legislative provision in question was to be the general scheme of corporate liability attribution.

8.91 The *Meridian* decision concerned an appeal in which the appellant corporate body sought to rely on *Nattrass*, arguing that the conduct and fault of an employee should not be attributed to the corporate body as the employee was not the “directing mind and will” of the defendant.

8.92 The Privy Council noted that a company’s existence is provided for by statute, which provides it with certain powers, rights and duties. The fact of a company’s existence necessarily requires there to be rules to determine when acts are attributable directly to

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<sup>125</sup> *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037.

<sup>126</sup> *Director General of Fair Trading v Pioneering Concrete (UK) Ltd* [1995] 1 AC 456; this case was also known as *In re Supply of Ready Mixed Concrete (No. 2)*, which was its title before the Court of Appeal.

<sup>127</sup> *Meridian Global Funds Management Asia Ltd v Security Commission* [1995] 2 AC 500.



the company. The Council went on to outline a general scheme of liability attribution, to be used to determine when acts can be attributed to the corporate body. These are the “rules of attribution”, which are divided into a three part hierarchy.

- 8.93 The “primary rules of attribution” are expressly provided for by the company’s constitution, or implied into the constitution by company law. Examples of these primary rules are resolutions of the board or a unanimous decision of the shareholders at a general meeting. These rules provide for the mental state (including criminal fault) of the corporate body to be identified. The Privy Council went on to note that these primary rules of attribution alone are not sufficient to enable a company to carry on its day-to-day business.
- 8.94 The “general rules of attribution” supplement the “primary rules”. The “general rules” include principles such as the principles of agency. Together, these primary and general rules of attribution enable the court to determine whether conduct (including criminal conduct) on the part of employees and other agents of the company may count as conduct of the company. With regard to these acts, the company will make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.<sup>128</sup>
- 8.95 The “special rules of attribution”: are required for exceptional cases in which the “primary” or “general” rules are excluded by a legislative provision or common law rule. An example of this is commonly seen in the criminal law, where liability is frequently imposed based upon the commission of both a conduct element and subjective fault element of the defendant personally (as distinct from the defendant acting through his or her servant or agent).<sup>129</sup>
- 8.96 In cases in which the “primary” or “general” rules are excluded, or would defeat the purpose or intention of the rule of law in question, “the court must fashion a special rule of attribution for the particular substantive rule”.<sup>130</sup> How this “special rule of attribution” is formulated will depend on the construction (that is, interpretation) of the relevant substantive rule in issue. The Privy Council noted that this approach is evidenced by the contrasting approaches of the UK House of Lords in its decisions in *Nattrass* (where the identification doctrine was applied) and in *Pioneering Concrete* (where vicarious liability was applied).
- 8.97 The purpose of the statutory duty in *Meridian* was to enable the immediate disclosure of the identity of persons who become substantial security holders in public issuers in fast-

<sup>128</sup> Lord Hoffman, *Ibid.* at 506-507.

<sup>129</sup> *Meridian Global Funds Management Asia Ltd v Security Commission* [1995] 2 AC 500, Lord Hoffman at 507.

<sup>130</sup> *Ibid.*

moving markets. Given this duty, the person whose knowledge must be taken as the knowledge of the company should be the person who acquired the securities in question with the authority of the company. To hold otherwise would be to defeat the purpose of the provision. Because of this, the Privy Council found that it was not necessary, therefore, to determine whether the employee was, in a general sense, the directing mind and will of the company. The Privy Council therefore allowed the knowledge of the employee to be attributed to the corporate body defendant by way of vicarious liability.

**(c) Natrass v Meridian – Confusion before the Courts of England and Wales**

8.98 Following *Meridian*, the approach to corporate liability taken by the Privy Council became the standard approach followed in England and Wales.<sup>131</sup>

8.99 However, despite the significant change to liability attribution introduced by *Meridian*, the judicial view that the identification doctrine was the authoritative approach did not completely disappear following the Privy Council’s decision. In *Attorney General’s Reference (No.2 of 1999)*,<sup>132</sup> the Court of Appeal, referred to *Natrass* stating that “it is impossible to find a company guilty unless its alter ego is identified” (emphasis added).<sup>133</sup>

8.100 Though *Meridian* was followed by the majority of the English Court of Appeal in *Odyssey Re (London) Ltd v OIC Run-Off Ltd*,<sup>134</sup> Buxton LJ, in his dissenting judgment, regarded the identification principle as outlined in *Natrass* as an authoritative formulation of the binding law of corporate liability.

8.101 Despite the influential effect which *Meridian* has had on the courts of England and Wales, the displacement of the identification doctrine as a general scheme of corporate liability attribution was called into question in 2010 by the English Court of Appeal decision in *R v St Regis Paper Co Ltd*.<sup>135</sup> In its decision, the Court of Appeal referred to both the *Attorney General’s Reference* case, and Buxton LJ’s dissent in *Odyssey*, and held that the identification doctrine should be the primary rule of attribution applied by the Court. The Court noted that there would be circumstances in which insistence on the application of the identification doctrine would defeat the intention of a statutory or regulatory provision. In such a case, the courts should fashion, on the basis of interpretation of the

<sup>131</sup> *Stone and Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] UKHL 39; [2008] 1 WLR 2846; *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46; [2010] 1 WLR 785.

<sup>132</sup> *Attorney General’s Reference (No.2 of 1999)* [2000] 2 Cr App R 207. Rose LJ described Lord Hoffman’s judgment in *Meridian* as merely a re-statement of the existing principles of attribution, rather than an abandonment of them. He held that Lord Hoffman’s speech was not to the effect that the common law principles as to the need for the identification doctrine had changed, but rather that the primary “directing mind and will” rule still applied, though it would not be determinative in all cases, in which case an additional special rule of attribution geared to the purpose of the statute might be fashioned.

<sup>133</sup> *Ibid.* at 216.

<sup>134</sup> *Odyssey Re (London) Ltd v OIC Run-Off Ltd* [2000] EWCA Civ 71, at 90 (Nourse LJ).

<sup>135</sup> *R v St Regis Paper Co Ltd* [2011] EWCA Crim 2527; [2012] 1 Cr App R 14.

relevant statute or regulation, a special rule of attribution geared to the purposes of the statute or regulation.

- 8.102 Despite this nod to the approach taken in *Meridian*, the Court of Appeal parted from the Privy Council’s approach by holding that the formulation of a special rule of attribution based on an interpretation of the applicable substantive law should be a position of last resort. The Court of Appeal found that the regulation in question in *St Regis Paper* did not require a departure from the identification doctrine.<sup>136</sup>
- 8.103 *St Regis Paper* threw a level of confusion into the discussion as to whether the identification doctrine or *Meridian*’s attribution principles were the primary general scheme of corporate liability attribution in the English and Welsh jurisdiction. However, the place of the *Meridian* principles as the dominant doctrine was re-established by the UK Supreme Court in *Bilta (UK) Ltd (in liquidation) v Nazir*,<sup>137</sup> where the Court endorsed the approach to liability attribution outlined by Lord Hoffman in *Meridian*.
- 8.104 The overall effect of *Meridian*, as confirmed by *Bilta*, is to relegate the identification doctrine to being one narrowly applicable model in a non-generic general scheme of corporate criminal liability.
- 8.105 *Meridian* has been approved by the High Court (albeit in a civil liability context) in *Crofter Properties Limited v Genport*.<sup>138</sup> In this case, the Court (McCracken J), in approving the principles of attribution laid down in *Meridian*, held that a company was vicariously liable for civil wrongs committed by its servants or agents, even though those servants or agents were third parties (rather than acting as the company).<sup>139</sup> This case concerned the plaintiff’s claim against the corporate body defendant for, among other things, arrears in rent, rather than an attempt to apply liability pursuant to any specific statutory provision. While the decision indicates a judicial preference in Ireland for the *Meridian* approach, it must be reiterated that this was in the context of attributing civil liability, rather than criminal liability.

#### **(d) Analysis of the *Meridian* Attribution Model**

- 8.106 Though *Meridian* applies a theoretically broader approach to corporate liability attribution than *Natgrass*, in practice the result of allowing a formulation of a “special rule” has tended to result in the application of vicarious liability. Without a rule of law expressly providing for a more nuanced/organisational model of attribution, it is difficult to envisage a circumstance in which this “special rule” could be formulated other than to locate the

<sup>136</sup> *Ibid.*, at 184-5.

<sup>137</sup> [2015] UKSC 23; [2016] AC 1. This decision was applied by the English High Court in *Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch).

<sup>138</sup> *Crofter Properties Limited v Genport* [2002] 4 IR 73.

<sup>139</sup> *Ibid.* at 83.

fault and conduct elements of a crime either by way of vicarious liability or through some version of the identification doctrine.

8.107 The commentary regarding the *Meridian* attribution doctrine has been mixed. The Commission has previously noted that *Meridian's* "purposive approach to attribution gave recognition to the complexities of diffuse management structures and the fact that corporations do not always operate on a purely hierarchical or vertical model."<sup>140</sup> It is true that a virtue of *Meridian* is that it leaves behind the concept that the functioning of corporate body is analogous to a natural person in favour of a more realistic recognition of the management structures of a corporate body is a positive step. However, the extremely broad approach of formulating a special rule of attribution for each individual rule of law (where the primary and general rules of attribution are not applicable) leaves the English and Welsh courts without a clear and certain general scheme of corporate liability attribution. This runs contrary to the principle of legality, which requires that criminal law rules are sufficiently clear and precise to allow a defendant the opportunity to understand whether its behaviour is criminal.<sup>141</sup>

## 2. The Expanded Identification Approach

8.108 The courts of England and Wales moved away from applying the strict identification doctrine because it tended to undermine the purpose of rules that were designed to regulate corporate bodies, particularly those that were large and had complex organisational structures. However, distinguishing and displacing the identification doctrine was not the only solution attempted by the courts. Another attempt to address the problem of the doctrine's excessive focus on the apex of the management structure is apparent in *El Ajou v Dollar Land Holding plc*.<sup>142</sup> In this case, rather than limiting the application of the doctrine, the English Court of Appeal reinterpreted it so as to broaden the scope of natural persons who might be identified as the directing mind and will of a corporate body.

8.109 The court noted that the doctrine does not require an assessment of the management or control of the corporate body in the round; rather, it requires the identification of the natural person having management and control of the offensive conduct in question. The question of which natural persons were responsible for business decisions generally is far

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<sup>140</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26 - 2003) at 1.51.

<sup>141</sup> See McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 42-56; and McIntyre, McMullan and Ó Toghda, *Criminal Law* (Roundhall 2012) at 45.

<sup>142</sup> *El Ajou v Dollar Land Holding plc* [1994] BCC 143, [1994] 2 All ER 685.

less relevant.<sup>143</sup> The court found that a company's "directing mind and will" may be found in different persons for different activities of the company,<sup>144</sup> and this requires:

"looking at the actual exercise of the company's powers. A person held out by the company as having plenary authority or in whose exercise of such authority the company acquiesces, may be treated as its directing mind."<sup>145</sup>

8.110 Although this expanded version of the identification doctrine appeared to provide a greater ability to focus on the actual exercise of a corporate body's powers, this approach was not applied much by the courts of England and Wales beyond this case. Instead the courts followed a trend of limiting the application of the identification doctrine, as outlined above.

8.111 In Canada,<sup>146</sup> for offences committed prior to the 31st of March 2004 (the date upon which the *Criminal Code of Canada* came into effect), the common law approach to corporate criminal liability continues to apply, and is another example of the expanded identification doctrine.<sup>147</sup>

8.112 In *Canadian Dredge & Dock v R*,<sup>148</sup> the Supreme Court of Canada augmented the principle laid down in *Nattrass*, in a similar manner to the Court of Appeal of England and Wales in *El Ajou*. The court justified this change to the doctrine as accounting for a more realistic view of the decision-making processes in corporate bodies than the simple "brain/body" analogy which was commonly used to justify the doctrine in the UK:<sup>149</sup>

"companies [...] must of necessity operate by the delegation and sub-delegation of authority from the corporate center; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in [*Nattrass*] may not accord with the realities of life in our country, however appropriate we may

<sup>143</sup> Nourse LJ, at 151-2, though the court accepted that the director "identified" in this case did not play a role in business decisions generally, he was responsible for the management and control of the relevant conduct.

<sup>144</sup> *El Ajou v Dollar Land Holding plc* [1994] BCC 143, [1994] 2 All ER 685, Rose LJ at 154.

<sup>145</sup> *Ibid.* Hoffman LJ at 159.

<sup>146</sup> Criminal law is a federal competence in Canada. Provincial legislatures do retain power to enact penal provisions in relation to provincial legislation, however, otherwise the criminal jurisdiction is federal.

<sup>147</sup> The common law approach to corporate criminal liability will continue to be applied for offences committed by a corporate body prior to 31 March 2004. This regime will be considered further below.

<sup>148</sup> *Canadian Dredge & Dock v R* [1985] 1 SCR 662.

<sup>149</sup> See Lord Denning's judgment in *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, at 172.

find to be the enunciation of the abstract principles of law there made.”<sup>150</sup>

8.113 The Supreme Court of Canada clarified the scope of this expanded doctrine further in *the Rhone v The Peter AB Widener*,<sup>151</sup> where the Court stated:

“... the focus of inquiry must be whether the impugned individual has been delegated the ‘governing executive authority’ of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.”

8.114 The continued operation of this doctrine was confirmed by the Supreme Court of Canada in *Delloite & Touche v Livent Inc.*<sup>152</sup>

**(a) The Identification Doctrine’s failure to account for aggregated fault**

8.115 A number of high profile UK cases have highlighted the failure of the identification doctrine to provide adequately for circumstances where the fault for a matter that appears to be a criminal result is dispersed throughout the organisational structure of the corporate body.

8.116 *R v P & O European Ferries (Dover) Ltd*<sup>153</sup> concerned the prosecution of the defendant ferry company and several of its senior and junior employees for manslaughter in relation to the Herald of Free Enterprise ferry disaster, in which 193 people died when the defendant’s ferry overturned within minutes of leaving the Belgian port of Zeebrugge in 1987. The English Central Criminal Court (Turner J) was satisfied that a corporate body could be indicted for manslaughter, because a state of mind could be attributed to a corporate body. This could be done through the identification of the controlling mind in one of the body’s agents, if that person had committed an act that fulfilled the fault (gross negligence) and conduct elements (causing death) of the crime of manslaughter.<sup>154</sup>

8.117 In the prior Report of the judicial inquiry into the Herald of Free Enterprise disaster (*the Sheen Report*),<sup>155</sup> it had been found that:

<sup>150</sup> *Canadian Dredge & Dock v R* [1985] 1 SCR 662, at 693.

<sup>151</sup> *Rhone (The) v Peter A.B. Widener (The)* [1993] 1 SCR 497.

<sup>152</sup> [2017] 2 SCR 855.

<sup>153</sup> *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App 72.

<sup>154</sup> *Ibid.* at 77-78.

<sup>155</sup> Sheen, *Report of Investigation of Herald of Free Enterprise* (Report of Court No 8075 HMSO 1987).

“a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships [...]. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.”<sup>156</sup>

8.118 The Report found that the capsizing of the *Herald of Free Enterprise* was partly caused or contributed to by a number of factors. These included negligence in the discharge of their duties by the ship’s master (who was not on board the ferry on the night in question), the chief officer (the captain on board on the night in question), and the assistant bosun, who did not begin to close the ferry’s bow doors until it had left Zeebrugge docks. This practice was apparently intended to reduce the cost of removing petrol fumes from the lorries on the ship, and it led to the capsizing. The capsizing was also partly caused by the fault of the corporate body owners, who may have either known about, or “turned a blind eye” to, the practice that led to the capsizing.

8.119 Despite this prior finding of collective and aggregate failure, when the court applied the identification doctrine, it found that the assistant bosun and the chief officer of the ferry (who had been identified as the “controlling mind” of the corporate body defendant) were not sufficiently highly placed in the management hierarchy of the company for their acts and omissions to represent those of the company. The defendant company was therefore acquitted of manslaughter by direction of the trial judge, as were, subsequently, the individual defendants.

8.120 This case has frequently been used to point out the failures of the identification doctrine. The Court’s analysis of the doctrine has been described as the “classic analysis of the relevant principles”.<sup>157</sup> Despite this being a faithful application of the doctrine, in circumstances where there was a clear and identified failure on the part of the company, the identification doctrine prevented the attribution of fault to the corporate body.

8.121 Similarly, in *R v Great Western Trains Company (GWT)*,<sup>158</sup> the corporate body defendant was prosecuted for manslaughter arising out of the Southall rail crash in England in 1997. The crash involved a passenger train which had been (unusually at the time) driven by only one person. An automatic warning system had malfunctioned, and a new protection system (which had been installed following previous crashes) was not in use because the driver had not been trained to use it. The driver had been aware that neither the

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<sup>156</sup> *Ibid.* at 14.1.

<sup>157</sup> *Attorney General’s Reference (No 2 of 1999)* [2000] QB 796, at 815 (Rose LJ).

<sup>158</sup> *R v Great Western Trains Company (GWT)* English Central Criminal Court, 30 June 1999; see Celia Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 112.

automatic system nor the new system was in operation; but the evidence in the case demonstrated that the corporate body defendant encouraged drivers to proceed with the journey even if the safety devices were not working. *En route*, the train passed a signal designed to alert the driver of oncoming danger. The driver was found to have missed this as he was preoccupied with packing his bag in advance of disembarking.

8.122 At trial, the prosecution argued that the defendant's liability should be established by proving that the company's management policies, which encouraged journeys proceeding without warning systems being effective, had directly led to the crash. The prosecution sought to establish that this management failure was sufficient to establish the direct liability of the defendant, without the requirement to identify the "controlling" mind of the company within an employee or agent of the company. In making this argument, the prosecution was seeking to establish an organisational liability approach to corporate liability.

8.123 The trial judge rejected this approach, holding that in order to prosecute a company for a serious offence such as manslaughter, the relevant fault element of the crime must be identified in a human actor.

8.124 As the prosecution did not make the case that the driver was the "controlling mind" of the corporate body in this case, the trial judge did not consider this issue. However, it is reasonable to assume that if the doctrine, as set out in *Nattrass*, had been applied in this case, the driver would have been found insufficiently senior within the company to act as its controlling mind.<sup>159</sup>

8.125 It is evident from this case that, despite a clear aggregation of failings in the management of the corporate body defendant (the maintenance of the train, the training of staff and in the standing management policies), fault could not be attributed to the corporate body defendant without identifying a human actor to whom "guilt" could be attributed. The Commission will examine below alternative organisational approaches to attributing subjective fault to the corporate body.

### **(b) Analysis of the Identification Doctrine**

8.126 The *Nattrass* interpretation of the identification doctrine focuses on persons at the apex of the corporate managerial structure only. This focus has the effect of significantly limiting the circumstances in which both criminal fault and criminal conduct can be identified in a corporate body. While the decision-making structures of many smaller corporate bodies may be simple enough to justify this fixation on a company's senior officers, corporate decision-making structures can now be extremely complex, particularly in larger corporate bodies or groups. As noted above, this "paradox of size" results in the

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<sup>159</sup> It should be noted, however, that this prosecution took place after the Privy Council decision in *Meridian*, discussed above, so it is not certain that the *Nattrass* identification doctrine would have been applied in this case.



difficulty that the *Nattrass* identification doctrine works better on smaller companies (where day-to-day decisions and actions are taken at a high managerial level as there is necessarily less distance or distinction between senior officials and mere agents or employees) but it cannot be applied with the same ease to the more complex corporate structures of large companies.

8.127 The requirement that both the fault and conduct element of an offence be identified in an individual designated the “directing mind and will” of the company also contributes to this disparity in the application of the *Nattrass* doctrine. The nature of corporate conduct is that (with the exception of omissions) it cannot be directly performed by the corporate body, but must be performed through an agent. As discussed above, the agents who are involved in the decision-making processes of the corporate body and those who carry out the conduct decided by those processes are unlikely to be a single individual, particularly in larger corporate bodies. It is undoubtedly the case that the majority of corporate conduct will not be performed by agents at the board level (as is required by the *Nattrass* identification doctrine) or even by agents with “governing executive authority” (as is required by the expanded doctrine). The strict and expanded identification doctrines both require that the fault and conduct elements of an offence be sourced within one individual. This fails to reflect the reality of corporate decision-making and the delegation of the conduct that makes those decisions manifest.

8.128 Aside from the difficulty in holding larger corporate bodies to account, the *Nattrass* identification doctrine can also incentivise senior management to ignore, or “turn a blind eye” to, the criminal acts of the corporate body’s agents, in order to shield the corporate body from criminal liability. The focus on senior management can also disincentivise internal reporting of suspected illegality to senior management for the same reason. Rather than encouraging good corporate decision-making and internal governance, the continued application of the *Nattrass* identification doctrine encourages poor corporate decision-making.<sup>160</sup>

8.129 As has been demonstrated by *Brent*, *Pioneering Concrete*, and *Meridian*, certain corporate decisions of larger corporate bodies will necessarily take place at lower levels in the corporate hierarchy, which are not the focus of the *Nattrass* doctrine. This difficulty can be mitigated by adopting a less strict interpretation of the identification doctrine, as was applied by the Supreme Court of Canada in *Canadian Dredge & Dock* and by the Court of Appeal of England and Wales in *El Ajou*. Allowing the “directing mind and will” of a corporate body to be identified at the level where the decisions which ground the fault-element of an offence are actually made is a more realistic view of corporate decision-making.

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<sup>160</sup> HM Revenue & Customs, *Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion* (17 April 2016).

8.130 As demonstrated by the analysis of the *P & O* and *GWT* cases above, even this more realistic approach continues to focus on the fault of individuals, rather than recognising some form of “aggregate fault”, as a true organisational liability model might. Despite this arguable failure of the expanded identification doctrine, it must be noted that it is also arguably not appropriate to infer subjective fault from disaggregated parts of knowledge or intention, which, if viewed in isolation would not satisfy the subjective fault requirements of an offence. The Commission considers organisational models for identifying subjective fault in a corporate body below.

### 3. Vicarious, Strict and Absolute Liability

8.131 Vicarious criminal liability provides that a corporate body can be criminally liable for the offensive actions of its employees where these actions are done in the course of their employment. Vicarious liability is frequently applied in the context of civil liability, as in the Irish *Crofter* case discussed above, where it is justified by facilitating proper compensation and loss distribution. However, this rationale does not hold for the criminal law. The imposition of vicarious liability for criminal behaviour achieves different, non-compensatory, policy objectives.<sup>161</sup>

8.132 Vicarious criminal liability evolved alongside the use of strict liability for statutory criminal offences, notably those enacted alongside the establishment of a regulatory body (including those of the type encompassed by this Report). Both strict liability and vicarious liability are exceptions to the presumption that criminal liability should only be imposed on a defendant who has subjective knowledge or intent, a “guilty mind” (*mens rea*). Despite the similarity between the two forms of liability, and the fact that strict liability offences will often apply liability vicariously, they are properly classified as distinct forms of liability.<sup>162</sup> Vicarious liability is derivative in nature: both the fault and conduct elements of the offence are sourced in another person and attributed to the defendant. Strict liability, however, does not require proof of fault. In cases where the defendant is a natural person, strict liability will be direct in nature, rather than derivative. Despite their distinction, the overlap between these two forms of liability means that the treatment of strict liability by the Irish courts provides useful insight into the applicable scope of vicarious liability.

8.133 As noted above, a corporate body is incapable of directly performing a positive act, and so (with the exception of conduct by omissions) it must conduct itself through an agent acting on its behalf. This leads to overlap between vicarious and strict liability in cases where a corporate entity is held strictly liable for positive criminal conduct. In such cases, the conduct element of the offence will be attributed vicariously to the corporate body from the agent who is acting within the scope of his or her agency for the corporate

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<sup>161</sup> See McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 361.

<sup>162</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 362.

body.<sup>163</sup> Once this conduct element is satisfied, liability will be imposed upon the corporate body.<sup>164</sup>

8.134 The distinguishing feature of vicarious liability is that it imposes liability but not culpability.

By contrast, direct liability is “founded on culpability as opposed to mere liability”.<sup>165</sup> Vicarious liability is therefore an exception to the general presumption that a finding of personal culpability is a necessary precursor to a finding of criminal liability. However, some commentators disagree with the categorisation of certain offences as imposing vicarious liability, particularly where the offence can arise from acts that are within the scope of an employee’s duties. In those cases, it has been suggested that the corporate body’s liability is in fact direct and comes about due to the corporate body’s failure to ensure compliance with the law in question.<sup>166</sup> It has been suggested that this distinction between direct and indirect liability is unhelpful, misleading,<sup>167</sup> and (given the nature of a corporate body as a collective entity) artificially ascribes human traits to the corporate body.<sup>168</sup> Despite these criticisms, the distinction is still an important feature of the law in this area.

8.135 Both in Ireland and England and Wales, as a general rule, vicarious liability is not imposed

for offences that require proof of knowledge or intention (*mens rea*),<sup>169</sup> because it is not considered appropriate that an employer should be criminally liable for an offence that required such knowledge or intention on the part of the offending employee.<sup>170</sup> Attributing liability for an intention or knowledge-based offence by way of vicarious liability has been recognised as unfair. The imputation of knowledge or intention onto one

<sup>163</sup> McAuley and McCutcheon, *Ibid.* at 363; Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 47-48; see also Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 198.

<sup>164</sup> Subject to the corporate body being able to successfully raise a due diligence defence, which is considered in Chapter 10, below.

<sup>165</sup> *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23, at paragraph 14 (Lord Neuberger).

<sup>166</sup> Pinto and Evans, *Corporate Criminal Liability* (Thomson, Sweet and Maxwell 2003) at 315.

<sup>167</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells”, (CP No 195 2010) at 198.

<sup>168</sup> *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23, at 70. Lord Neuberger notes this criticism but goes on to state that the distinction is one that is “firmly embedded in our law and has had a considerable influence on the way it has developed”.

<sup>169</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010), at 87, paragraph 5.4: vicarious liability can be incurred in the criminal law by way of statutory offences that impose an absolute duty on the employer, even where they have not authorised or consented to the act; See McAuley and McCutcheon, *Criminal Liability* (Roundhall 2000) at 363, fn 13: “the offence of serving an on-duty constable contrary to the [UK] *Licensing Act 1872*, s. 16(2), attracts vicarious liability (*Mullins v Collins* (1874) LR 9QB 292) but not strict liability (*Sherras v De Rutzen* [1895] 1 QB 918).”

<sup>170</sup> In the 18<sup>th</sup> century English case *R v Huggins* (1730) 2 Stra 883, Raymond CJ noted, at 885, that “in the criminal cases the principal is not answerable for the act of the deputy as he is in civil cases: they must answer for their own acts, and stand or fall by their own behaviour [...] to affect the superior by the act of his deputy, there must be the command of the superior.”

“person” (the corporate body) for the wrongs of another (the employee or agent), in circumstances where the corporate body did not otherwise advert to that fault, sits uncomfortably in the context of such offences.<sup>171</sup>

- 8.136 The use of vicarious liability is not totally absent from Irish criminal law, however. The Supreme Court considered the constitutionality of this use of vicarious liability in *Re the Employment Equality Bill 1996*, where it was found to be constitutionally permissible in at least 2 circumstances. Vicarious liability is permissible where: the defendant is acting subject to a particular privilege (such as being engaged in a market practice subject to a licence or authorisation), or is subject to a specific duty to ensure that public standards are upheld, and where circumstances may make it difficult, invidious or redundant to make the employee in question criminally liable for the wrongful act.<sup>172</sup> The Supreme Court found that this approach would be permissible where the offence, and the sanction prescribed, was such as to be “likely to attract a substantial measure of opprobrium.”<sup>173</sup>
- 8.137 Vicarious liability does not require proof of subjective fault directly on the part of a defendant, but it may or may not require fault to be derived from another.<sup>174</sup> It also traditionally does not provide a defendant with a due diligence defence. As such, it is subject to similar criticisms as a wide-ranging regime of absolute liability.<sup>175</sup>
- 8.138 Absolute liability offences attract criticism because, like vicarious liability offences, they do not require proof of fault. However, unlike strict liability offences, they punish a defendant whether or not the defendant has taken reasonable steps to prevent the wrong. In the case of corporate defendants, the criminal conduct in question may still be attributed to the body by means of vicarious liability.<sup>176</sup>
- 8.139 Keane J, in his dissenting judgment in *Shannon Regional Fisheries Board v Cavan County Council*,<sup>177</sup> suggested that it would be unconstitutional for the Oireachtas to enact a law that made all criminal offences ones of absolute liability, because such a law would deprive defendants of the right to a trial in due course of law under Article 38.1 of the Constitution. Keane J did accept, however, that the use of absolute liability was not completely unacceptable for offences that were regulatory in nature and justifiable on strong public policy grounds. Keane J also added that there was a strong policy reason for

<sup>171</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) at 20.

<sup>172</sup> *In re the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>173</sup> *Ibid.* at 373: the offence under scrutiny, in section 15 of the *Employment Equality Bill 1996*, could result in a fine of £15,000 and/or up to 2 years imprisonment.

<sup>174</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 363.

<sup>175</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26 - 2003) at 1.38.

<sup>176</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 363; Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 47-48; see also Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 198.

<sup>177</sup> *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267.

including some version of a “due diligence” defence in offences that applied to corporate bodies (that is, strict liability offences). In particular, this would encourage and incentivise corporate bodies who wished to comply with the legislation in question to put in place policies, procedures and personnel to minimise the risk of committing offences. It is notable that this judicial suggestion, which has since been quoted with approval by the Supreme Court in *Waxy O’Connors Ltd v Riordan*,<sup>178</sup> has been adopted in many statutory regimes and is in turn reflected in the approach adopted by many regulatory bodies in the content of their corporate governance-type statutory codes and guidance documents, discussed above.

8.140 The limits of the constitutional application of strict and absolute liability were considered in *CC v Ireland (No.2)*,<sup>179</sup> in which the Supreme Court held that exposing the defendant to a maximum sentence of life imprisonment, without requiring culpability with respect to a conduct element of a serious offence, was unconstitutional.<sup>180</sup> *CC* was decided on similar grounds to *Re Employment Equality Bill 1996* and it supports the position that it is not permissible under the Irish Constitution to use vicarious liability for subjective fault based offences that are serious in nature, where the accused is not provided with the opportunity to raise a due diligence defence.

8.141 Vicarious criminal liability is commonly used in legislation enforced by regulatory bodies.<sup>181</sup> Legislation may not expressly provide for the use of vicarious liability, but its use will be implied where failing to render the corporate employer liable for the acts of its employees or agents would leave the legislation wholly inoperative.<sup>182</sup> However, legislation may also expressly provide for the use of vicarious liability.<sup>183</sup>

**(a) The United States Doctrine of *Respondet Superior***

8.142 While vicarious criminal liability is confined in its application only to offences that are “regulatory” and relatively minor in character in this jurisdiction,<sup>184</sup> the United States has adopted the doctrine of *respondet superior* as its generic model at the federal level. Wells has argued that early development of more strategic (complex) corporate

<sup>178</sup> [2016] IESC 30.

<sup>179</sup> *CC v Ireland (No. 2)* [2006] IESC 33, [2006] 4 IR 1.

<sup>180</sup> The Supreme Court relied on *Re the Employment Equality Bill 1996* [1997] 2 IR 321 in holding that the offence failed to respect the liberty or dignity of the individual and constituted a failure by the State to vindicate the right of the citizen to liberty and his good name, rights so rooted in the traditions of the people as to be ranked as fundamental.

<sup>181</sup> Wells, “Containing Corporate Crime” in Gobert and Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge 2011) at 25.

<sup>182</sup> *Mullins v Collins* (1874) LR 9 QB 292.

<sup>183</sup> Section 31(1) of the *Intoxicating Liquor Act 1988*, as amended by section 14(1)(b) of the *Intoxicating Liquor Act 2000*.

<sup>184</sup> *Waxy O’Connors Limited v Judge David Riordan* [2016] IESC 30, the distinct treatment of offences that are “regulatory in character” was confirmed by the court.

hierarchies in the US may have led to this less restrictive attribution model being used from an early stage.<sup>185</sup>

8.143 This model of liability attribution operates in a similar manner to the Irish doctrine of vicarious criminal liability: both the fault and conduct elements of the offence are sourced in individuals acting on behalf of the corporate body.<sup>186</sup>

8.144 Despite the general application of vicarious criminal liability in the US at Federal level,<sup>187</sup> the American Law Institute has adopted an approach similar to that set out by the Supreme Court in this jurisdiction, in *Re Employment Equality Bill 1996*, in its *Model Penal Code*.<sup>188</sup> This model is considered further below.

### **(b) Conclusion**

8.145 The vicarious criminal liability model has been found to be constitutionally acceptable only in limited circumstances in this jurisdiction, when it appears to be expressly or implicitly required by a specific statutory provision.<sup>189</sup> Unlike in the United States, this model cannot serve as a generic general scheme of attribution in Ireland. *Re Employment Equality Bill 1996* and *CC (No 2)* demonstrate that vicarious liability is not suitable for offences that are serious in nature, as the imposition of serious liability and opprobrium should generally only result where culpability is identified directly within the offender.

8.146 However, this difficulty may be cured in any general scheme of liability that takes vicarious liability as a default stance, but accompanies it with the crucial inclusion of a due diligence defence.<sup>190</sup>

8.147 However, using vicarious liability to attribute subjective fault may not be compatible with offences that require proof of subjective fault in this jurisdiction. The Commission has previously noted that it is not appropriate for liability for serious crimes to be attributed to

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<sup>185</sup> Wells, "Corporate criminal liability: a ten year review" [2014] Crim LR 877, at 853.

<sup>186</sup> Pop, "Criminal Liability of Corporations – Comparative Jurisprudence", (submitted as part of the King Scholar Program, Michigan State University College of Law, 2006) at 35. Available at: [http://www.law.msu.edu/king/2006/2006\\_Pop.pdf](http://www.law.msu.edu/king/2006/2006_Pop.pdf).

<sup>187</sup> This doctrine was established in *New York Central & Hudson River Railroad Co v United States* 212 US 481 (1909). See also Coffee, "Corporate Criminal Liability: An Introduction and Comparative Survey" in *Criminal Responsibility of Legal and Collective Entities – International Colloquium* (May 1998) at 15. For a justification for the American court's use of this approach also see *United States v MacAndrews & Forbes Co* 149 F 823, 835 (SDNY 1906). US Federal District Court Judge Hough held (at 836) that "[t]he same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law, does not, in my opinion, bear discussion."

<sup>188</sup> American Law Institute, *Model Penal Code* (see Official Draft as adopted at the 1962 Annual Meeting of The American Law Institute).

<sup>189</sup> *In the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>190</sup> See Prendergast, "Strict Liability and the presumption of mens rea after CC", (2011) 46 Ir Jur 211.

a corporate body without requiring proof of a mental element. To allow this extension of the status quo would “require a reconsideration and reshaping of fundamental concepts within the criminal justice system, particularly the concept of blame.”<sup>191</sup>

8.148 It should be noted, however, that the use of vicarious liability to attribute criminal conduct alone may not be appropriate where another, more appropriate, form of attribution is used to attribute fault to the corporate body.

#### 4. Failure to Prevent

8.149 In this section, two different forms of the “failure to prevent” approach are considered:

- (1) the legislation-specific liability attribution model provided by section 9 of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*; and
- (2) the separate offence model provided by section 7 of the UK *Bribery Act 2010*.

8.150 These two models are considered in turn.

##### (a) Section 9 of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*

8.151 The *Criminal Justice (Offences Relating to Information Systems) Act 2017* enacted a number of new criminal offences aimed at tackling specific forms of cybercrime.<sup>192</sup> The 2017 Act implemented the 2013 EU Directive on attacks against information systems,<sup>193</sup> and provisions of the *Council of Europe Convention on Cybercrime* (the Budapest Convention), to which Ireland is a signatory, but which, at the date of writing, has not ratified.<sup>194</sup>

8.152 Section 9 of the 2017 Act provides for two mechanisms for attributing liability for an offence under the Act to a corporate body. Section 9(1) of the 2017 Act provides a mechanism that is specifically designed to give effect to article 10.2 of the EU Directive,<sup>195</sup>

<sup>191</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26 - 2003) at 1.40. The Commission made this point about the question of imposing strict liability on corporate bodies for crimes of homicide; however, the point applies equally to the use of vicarious liability as a general scheme of liability for all serious offences, including homicide.

<sup>192</sup> Section 2 creates the offence of accessing information system without lawful authority; section 3 creates the offence of interference with information system without lawful authority; section 4 creates the offence of interference with data without lawful authority; section 5 creates the offence of intercepting transmission of data without lawful authority; and section 6 creates the offence of use of computer programme, password, code or data for purposes of section 2, 3, 4 or 5.

<sup>193</sup> *Directive 2013/40/EU of the European Parliament and the Council of 12 August 2013 on attacks against information systems*.

<sup>194</sup> *Council of Europe Convention on Cybercrime* (ETS No.185), which Ireland signed on the 28th of February 2002.

<sup>195</sup> Section 9(3) also provides for derivative liability to be imposed upon certain agents of the corporate body who consented to or connived in the commission of the offence by the corporate body, or the body’s offending was attributable to any wilful neglect on that agent’s part (this form of derivative liability will be considered further in Chapter 9: Liability of Corporate Managerial Agents).

which allows liability to be imposed upon the corporate body due to a failure to prevent the contingent offending of a person acting on its behalf.

8.153 Article 10.2 of the Directive requires Member States to “ensure that legal persons can be held liable where the lack of supervision or control by a person [...] has allowed the commission, by a person under its authority, of any of the offences referred to in Articles 3 to 8 for the benefit of that legal person”. To transpose article 10.2 into Irish law, the specific model of corporate criminal liability found in section 9(1) was included in the Act. Section 9(1) provides that a corporate body shall be guilty of a relevant offence where:

- the offence is committed for the benefit of a body corporate,
- by an agent or subsidiary of the corporate body,<sup>196</sup>
- its commission being attributable to the failure to exercise sufficient supervision or control over that agent or subsidiary, by certain office or function holders within the corporate body.<sup>197</sup>

8.154 The liability imposed upon the corporate body under this provision is vicarious in nature, as it is derived from the wrongful conduct and fault of persons other than the corporate person. Unlike broader, vicarious liability models considered above, a failure to act reasonably on the part of senior members of the corporate body’s management, which causatively resulted in the principal offending, must be proved (in addition to proving the fault and conduct elements of principal offender).

8.155 Section 9(1) does not require proof of any fault on the part of the corporate body, and as such is a strict liability offence. Section 9(2) provides the corporate body defendant with a due diligence defence where it can prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

8.156 The clear aim of article 10.2 of the 2013 Directive, and section 9(1) and (2) of the 2017 Act, is to drive corporate bodies to ensure that they have mechanisms in place to ensure that their management prevent employees and subsidiaries committing offences under the Act.<sup>198</sup>

8.157 It might be argued that this attribution model could be subject to the same constitutional objections as those outlined in *Re the Employment Equality Bill 1996*, in that the corporate

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<sup>196</sup> The offence must be committed by a “relevant body”, which section 9(5) defines as “a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, or [...] an employee, subsidiary or agent of the body corporate”.

<sup>197</sup> These officer or function holders being “a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity”.

<sup>198</sup> Recital (26) of the Directive indicates that the aim of this provision is, at least in part, to drive appropriate levels of protection from the threat of cybercrime.



body may be held liable on conviction on indictment to an unlimited fine,<sup>199</sup> and that these are clearly serious offences that are “likely to attract a substantial measure of opprobrium.” However, it is important to note that section 9(2) of the 2017 Act provides the defendant corporate body with a due diligence defence, which would appear to satisfy the constitutional requirements highlighted in *Re the Employment Equality Bill 1996*.

8.158 It has also been noted that no constitutional challenges have been brought to comparable offences such as causing death by dangerous driving<sup>200</sup> and that, since *CC*, the courts have indicated that the provision of a due diligence defence may have the effect of precluding such a challenge.<sup>201</sup>

8.159 Moreover, the “due diligence” approach in the 2017 Act is also consistent with the view expressed by Keane J in *Shannon Regional Fisheries Board v Cavan County Council*,<sup>202</sup> discussed above, and which was quoted with approval by the Supreme Court in 2016 in *Waxy O’Connors Ltd v Riordan*.<sup>203</sup>

8.160 Section 9(4)(a) of the 2017 Act provides for a second model of corporate liability attribution. This provides that liability may also be imposed upon the corporate body based upon the provisions of the “general law, whereby acts of a natural person are attributed to a body corporate resulting in criminal liability of that body corporate for those acts”. In the parliamentary debates preceding the enactment of the 2017 Act, it was noted that section 9(4)(a) “preserves the common law doctrine on corporate criminal liability”.<sup>204</sup> As is clear from the above, there is uncertainty as to the common law test, or tests, to be applied to determine how to attribute subjective fault based criminal liability to the corporate body. However, based upon the approval of the identification doctrine in a civil context in this jurisdiction,<sup>205</sup> it is likely that this is the liability model being referred to in the parliamentary debates.

8.161 The failure to prevent model in section 9(1) of the 2017 Act can, however, be criticised if it is assumed that it involves the application of the *Nattrass* identification doctrine. Unlike the failure to prevent offence provided by section 7 of the UK *Bribery Act 2010*,

<sup>199</sup> Section 8.

<sup>200</sup> Section 53 of the *Road Traffic Act 1961*.

<sup>201</sup> Prendergast, “Strict Liability and the presumption of mens rea after *CC*”, (2011) 46 *Ir Jur* 211, at 219.

<sup>202</sup> *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 *IR* 267.

<sup>203</sup> [2016] *IESC* 30.

<sup>204</sup> Minister of State at the Department of Justice and Equality, David Stanton, Committee Stage Debate on *Criminal Justice (Offences Relating to Information Systems) Bill 2016* (Seanad Éireann Debate, 16 May 2017, Vol. 251 No. 12).

<sup>205</sup> *Fyffes plc v DCC plc* [2009] 2 *IR* 417; The Department of Justice, which was the governmental department with responsibility for the development of the Bill of this Act, has previously acknowledged its view that the common law in this jurisdiction provides for the application of the *Nattrass* identification doctrine in criminal proceedings also, see OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Ireland* (December, 2013) at 21-22.

considered below, section 9(1) does not criminalise organisational faults in the corporate body's systems or policies that result in offending in general. Rather, it confines the scope of fault to errors in supervision by high-level managers. This, as outlined above, has the effect of unduly limiting the imposition of liability and potentially rendering smaller, less organisationally complex corporate bodies more susceptible to being held liable than larger, more complex corporate structures. Since part of the intended effect of the 2017 Act is to ensure "an adequate level of protection and security of information systems by legal persons",<sup>206</sup> the criticism of the (admittedly assumed) Nattrass identification doctrine implicitly referred to by section 9(4)(b), means that section 9 may not be fully successful in achieving this intended effect.

**(b) Section 7 of the UK *Bribery Act 2010***

8.162 The "failure to prevent" approach in section 7 of the UK *Bribery Act 2010* is, broadly, similar to the vicarious criminal liability approach. The UK 2010 Act makes corporate liability contingent on a managerial agent meeting subjective fault requirements for their wrongful act in circumstances where it is not necessary for the prosecution to prove fault on the part of the corporate body. However, the important distinction between this model and the vicarious criminal liability approach is that with the approach in the UK 2010 Act the corporate body is held primarily liable for its failure to prevent the offence committed by the person acting on its behalf from happening.<sup>207</sup>

8.163 The UK *Bribery Act 2010* was enacted in response to criticism of the UK's reliance on the identification doctrine for bribery offences, which was widely recognised as being too narrowly focused on the involvement of the most senior corporate managers and officials, and inadequate for the modern delegated and decentralised structure of large multinational corporate bodies.<sup>208</sup> The similarities between this approach and vicarious liability has led to it being treated as a form of modified vicarious liability by some academic commentators. These commentators argue that, despite being framed as imposing primary liability based on a failure to act, the fact that liability is contingent on

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<sup>206</sup> Recital (26) of the Directive 2013/40/EU.

<sup>207</sup> Ormerod, *Presentation at Law Reform Commission Annual Conference*, (November 2016).

<sup>208</sup> Pieth, Low and Cullen, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press 2007), Article 2 – The Responsibility of Legal Persons.

the subjectively culpable offending of another renders section 7 of the 2010 Act a vicarious liability provision.<sup>209</sup>

- 8.164 Section 7 of the UK *Bribery Act 2010* creates an offence that is committed when a company fails to prevent persons associated with it committing bribery. The corporate body directly satisfies the conduct element of the offence by its omission in failing to prevent the contingent offending. This provision imposes primary liability on a corporate body based upon its failure to prevent offending, rather than imposing derivative liability upon the corporate body and treating it as a principal offender.
- 8.165 There is no need for the corporate body to have knowledge of the bribery. The corporate body need not demonstrate any criminal fault in order to attract liability. However, as a defence, the body can prove that it had “adequate procedures” in place, designed to prevent the criminal conduct; that is, the corporate body can assert a due diligence defence. Section 7, therefore, creates a strict liability offence.
- 8.166 Like Section 9(1) of the 2017 Act, considered above, section 7 is aimed at encouraging compliance and risk management by corporate bodies. It is an offence-specific scheme of liability, and it does not replace the general common law provisions for corporate liability in relation to any other offence. It is, however, worth noting that the common law approach to liability attribution continues to apply in relation to the 3 other offences in the 2010 Act: offences relating to bribing another person, or “active” bribery (section 1); offences relating to being bribed, or “passive” bribery (section 2); and bribery of foreign public officials (section 6).
- 8.167 Again, like section 9(1) of the 2017 Act above, the failure to prevent offence in section 7 of the UK 2010 Act circumvents the general presumption that vicarious liability is not imposed for offences that require proof of knowledge or intention.<sup>210</sup> While section 7 does not require proof of knowledge, intent or subjective recklessness on the part of the

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<sup>209</sup> Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 849, at 865 has noted that it was initially argued that the use of vicarious liability was “too rough and ready” for attributing blame for serious harm as only requiring liability to flow from an individual regardless of the fault of the corporate body, or blaming the corporate body even if all fault lay with an individual, was seen as inappropriate. However, the UK parliament eventually replaced the offence of “negligently failing to prevent bribery” which had been included in earlier drafts of the *Bribery Bill* (See Joint Committee on the Draft Bribery Bill - *First Report*, 16 July 2009). Available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm>, with a failure to prevent offence based upon vicarious liability.

<sup>210</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 87, paragraph 5.4: vicarious liability can be incurred in the criminal law by way of statutory offences that impose an absolute duty on the employer, even where they have not authorised or consented to the act; See McAuley and McCutcheon, *Criminal Liability* (Roundhall 2000) at 363, fn 13: “the offence of serving an on-duty constable contrary to the [UK] Licensing Act 1872, s. 16(2), attracts vicarious liability (*Mullins v Collins* (1874) LR 9QB 292) but not strict liability (*Sherras v De Rutzen* [1895] 1 QB 918).”

corporate body, it does require that a person associated with the corporate body<sup>211</sup> bribes another person, intending to obtain or retain business for the corporate body, or to obtain or retain an advantage in the conduct of business for corporate body.

- 8.168 The effect of allowing the corporate body's liability to result from the fault of another person in this manner has been to create what has been described as the "toughest legal regime against bribery anywhere in the world".<sup>212</sup> A conviction on indictment for the offence under section 7 can result in a potentially substantial fine (there being no prescribed maximum limit),<sup>213</sup> which meets the Supreme Court description in the *Employment Equality Bill 1996* case that this is a serious offence is "likely to attract a substantial measure of opprobrium."
- 8.169 Although the section 7 offence shares similarities with vicarious liability, its provision of a due diligence defence indicates that it is intended to target organisational faults in corporate bodies that lead to bribery. In this sense, the section 7 model of liability addresses similar issues to the organisational liability models (discussed further below) but without placing the obligation on the prosecution to prove organisational fault. As such, section 7 focuses on allegations "of inadequate systems to prevent associated persons from committing an offence of bribery".<sup>214</sup>
- 8.170 The "failure to prevent" model has also been used in the UK *Criminal Finances Act 2017*, which enacted two offences of "failing to take reasonable steps to prevent tax evasion": one for foreign tax evasion, and; one for domestic tax evasion. A guidance document from HM Revenue & Customs explained that the policy objective of extending the use of the

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<sup>211</sup> Section 8 broadly defines "associated person" as including "a person who performs services for or on behalf of" the corporate body, and notes that "[t]he capacity in which [the associated person] performs services for or on behalf of [the corporate body] does not matter".

<sup>212</sup> British Bankers' Association, *Anti-Bribery and Corruption Guidance* (May 2014) at 4 – this is also due to the extra-territorial effect of the effect.

<sup>213</sup> Section 11(3) provides that "[a] person guilty of an offence under section 7 is liable on conviction on indictment to a fine."

<sup>214</sup> Section 7 was considered by the English High Court in *Serious Fraud Office v Standard Bank Plc* in the context of the judicial approval of the UK's first deferred prosecution agreement (DPA) under the *Crime and Courts Act 2013* (considered further in Chapter 5, above). A DPA was agreed, and approved by the court, regarding a prosecution of Standard Bank Plc under section 7 of the *Bribery Act 2010*.

The English High Court noted that "the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal" rather than from the commission of an offence of bribery (see *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen's Bench Division (Leveson P), 30 November 2015, paragraph 14).

The Court also noted that "no allegation of knowing participation in an offence of bribery" was alleged by the SFO against the bank (or any of its employees), and that the offence was "limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery" (see paragraph 11).

“failure to prevent model” was to “overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act on their behalf.”<sup>215</sup>

8.171 As noted above, imposing potentially serious liability without requiring proof of some fault on the part of a defendant is likely to be constitutionally permissible in circumstances in which the defendant is provided with a due diligence defence.<sup>216</sup> As such, the type of defence found in section 7(2) of the UK 2010 Act would appear sufficient to render this liability attribution model constitutional.

8.172 It is notable in this respect that the equivalent of the UK 2010 Act in this jurisdiction, the *Criminal Justice (Corruption Offences) Act 2018*, broadly mirrors the “failure to prevent” approach in the UK 2010 Act. Section 18 of the 2018 Act provides that a body corporate will be guilty of an offence where an offence under the 2018 Act is committed by an officer,<sup>217</sup> employee, agent or subsidiary of that body corporate with the intention of obtaining or retaining business for the body corporate, or an advantage for it in the conduct of its business. It is a defence under the 2018 Act for a body corporate to prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

8.173 The offence in section 18 of the 2018 Act is comparable to section 7 of the UK *Bribery Act 2010*, in that a corporate body is held liable for its failure to prevent a person associated with it from committing an offence under the 2018 Act. Unlike section 9(1) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*, discussed above, liability under section 18 of the 2018 Act is not contingent on the failure of an officer of a body corporate, or a person purporting to act in that capacity, to exercise the requisite degree of supervision or control of the relevant person. Rather, as with section 7 of the UK *Bribery Act 2010*, liability will be attributed based on organisational faults in a corporate body’s systems or policies, so that this does not give rise to the Nattrass identification doctrine concerns that were discussed above in connection with the 2017 Act. The model used in section 18 of the 2018 Act may therefore be more effective in ensuring compliance and incentivising good governance. The due diligence defence in the 2018 Act is discussed in more detail in Chapter 10, below.

### **(c) Advantages and disadvantages of the failure to prevent model**

8.174 It has been argued that the failure to prevent model helps address difficulties in holding corporate bodies to account for the criminal acts or omissions of their agents, and

<sup>215</sup> HM Revenue & Customs, *Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion* (17 April 2016) at paragraph 1.3.

<sup>216</sup> See *CC v Ireland (No. 2)* [2006] IESC 33, [2006] 4 IR 1, and *Re the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>217</sup> An “officer” includes a director, manager, secretary or other officer of the corporate body, a person purporting to act in that capacity, and a shadow director.

incentivises them to put in place adequate procedures and that it promotes corporate good governance.<sup>218</sup>

8.175 Following its introduction, section 7 of the (UK) *Bribery Act 2010* was not initially relied on to any great extent by prosecuting bodies in the United Kingdom. However, from 2015 onwards, there has been an increased reliance on the offence, and as such, there has been greater judicial consideration of section 7.<sup>219</sup>

8.176 An argument in favour of using the failure to prevent model for a bribery related offence, is that, although the bribery conduct is committed by individuals, the act will always be for the benefit of the corporate body.<sup>220</sup> This logic is also present in the UK's 2017 failure to prevent tax evasion offences.<sup>221</sup>

8.177 However, it will not always be the case that a wrongful act committed by an agent of a corporate body either on that body's behalf or within the scope of that agent's function, will be for the benefit of the corporate body. An example of such wrongdoing might be fraud or manslaughter, or possibly offences such as those in the 2017 Act. While such

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<sup>218</sup> HM Revenue & Customs, *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion* (16 July 2015) at paragraphs 2.18-2.19; HM Revenue & Customs, *Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion* (17 April 2016) at paragraph 1.9.

<sup>219</sup> In addition to the Standard Bank Plc DPA discussed above (at footnote 217), a civil settlement and payment of a fine was agreed between Brand Rex Ltd and the Scottish Crown Office and Prosecutor Fiscal Service for a contravention of section 7 by the company (see Scottish Financial News, *Glenrothes cabling company pays £212,800 after reporting itself for failing to prevent bribery by a third party* (28 September 2015) available at <https://www.scottishfinancialnews.com/6108/glenrothes-cabling-company-pays-212800-after-reporting-itself-for-failing-to-prevent-bribery-by-a-third-party/>). In this case, Brand Rex Ltd reported its own contravention of the requirement in section 7 of the 2010 Act by failing to prevent bribery by an independent installer of its products who improperly provided travel tickets to a customer. As the contravention had been "self reported", the Scottish Crown Office applied its "self-reporting initiative" which allowed a civil settlement to be reached rather than proceeding with a criminal prosecution.

In December 2015, the first conviction under section 7 occurred when Sweett Group Plc pleaded guilty to the offence in the English Crown Court, following an investigation by the UK Serious Fraud Office (see Serious Fraud Office, *Sweett Group PLC pleads guilty to bribery offence*, Press Release on 18 December 2015, available at <https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>).

In July of 2016, the second DPA under the *Crime and Courts Act 2013* was agreed in *SFO v XYZ*, among other offences, a contravention of section 7 by the company (*Serious Fraud Office v XYZ Ltd* (Case no. U20150856) Unreported Queens Bench Division, Lord Justice Leveson's Preliminary Judgment of the 8th of July 2016; *Serious Fraud Office v XYZ Ltd* (Case no. U20150856) Unreported Queens Bench Division, Lord Justice Leveson's Approved Judgment of the 11th of July 2016).

In January of 2017, a third DPA under the *Crime and Courts Act 2013* was agreed in *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems inc* (Case no: U20170036), Unreported Queens Bench Division, Lord Justice Leveson's Approved Judgment of the 17th of January 2017. The judgment of Lord Justice Leveson again included consideration of section 7 of the UK *Bribery Act 2010*.

<sup>220</sup> Section 7(1) requires that the act is intended to "obtain or retain business [...] or [...] an advantage in the conduct of business" for the corporate body.

<sup>221</sup> See footnotes 218 and 221 above.

offences might inherently relate to a business benefit for the corporate body, they may still be committed in the context of a corporate body's operation, or using corporate resources. As such, it is arguable that the criminal law is justified in seeking to encourage corporate bodies to strive to prevent such conduct in any of these cases. However, such offences may also be committed by rogue corporate agents, operating against the interests of the company, and acting against corporate policies and decisions. If the failure to prevent model for such offences provides the corporate defendant with a defence of acting reasonably in its attempts to prevent such offending (including a due diligence defence), then the risk that offending arises from the conduct of rogue agents will not result in unfairness. This is because the nature of the corporate defendant's blameworthiness under this model is its failure to act reasonably as to the risk of its agents acting criminally.

8.178 While it might be justifiable to use the failure to prevent model for a specific offence, or in a specific piece of legislation, this model may not be suitable for use as a generic scheme of corporate liability attribution. The effect of applying this model generally would be to place an extremely onerous, strict liability general duty on the corporate body to prevent all offending. Particularly in circumstances in which the model does not require the contingent offending to be for the benefit of the corporate body, this may result in unfairness.<sup>222</sup> Sections 9(1) and (2) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017* overcome this particular potential difficulty by requiring that the contingent offence be committed for the benefit of the corporate body as an express proof of the corporate liability mechanism.

## 5. Due Diligence

8.179 Aside from the main approaches discussed so far (strict identification, rules of attribution, expanded identification, vicarious/ strict liability and failure to prevent), another concept that can be used in a corporate liability regime modelled on the main approaches outlined above is that of due diligence.<sup>223</sup>

8.180 Different jurisdictions have used failure to exercise due diligence as an ingredient in corporate criminal liability attribution models in various ways. It has been used as the

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<sup>222</sup> Wells, "Corporate criminal liability: a ten year review" [2014] Crim LR 849, at 864; Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010), at 108-109.

<sup>223</sup> As identified by Wells, Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, "Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells" (CP No 195 2010) at 198, paragraph C.4. Wells divides this into two concepts: failure to supervise (where the absence of due diligence is used as a trigger for an offence), and; due diligence.

trigger of liability,<sup>224</sup> it has been used as a defence (which is its common use in Ireland in relation to statutory strict liability offences),<sup>225</sup> as a factor in whether to exercise prosecutorial discretion to decline a prosecution,<sup>226</sup> and as a mitigating factor in sentencing.<sup>227</sup>

8.181 As noted above, Keane J in *Shannon Regional Fisheries Board v Cavan County Council*,<sup>228</sup> pointed out that the practical advantage of incorporating due diligence into a corporate criminal liability scheme is that it encourages the development of effective corporate compliance policies by corporate bodies. The analysis of Keane J was quoted with approval by the Supreme Court in 2016 in *Waxy O’Connors Ltd v Riordan*.<sup>229</sup> The Commission’s recommendations regarding the use of due diligence in relation to corporate offences is discussed in Chapter 10, below.

## 6. An Organisational Liability Model

8.182 Organisational fault occurs when, for example, a corporate body does not have in place policies, procedures or systems to prevent persons being exposed to the risk of financial loss, or unreasonable risk of physical harm. It can also occur when the corporate body’s monitoring and supervision of those it has put in a position to commit an offence or cause harm are inadequate, and when the corporate ethos or culture is such as to tolerate or encourage offences.<sup>230</sup>

8.183 As already noted, a corporate body cannot directly “know”, “intend” or “foresee” risk in the same way as a natural person. A model of corporate criminal liability that incorporates

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<sup>224</sup> Section 2 of Chapter 9 of the *Finnish Penal Code (743/1995)*, as amended by *Act 61/2003*, sets out that a corporate body will be liable for a criminal offence where “a person who is part of its statutory organ or other management or who exercises actual decision-making authority there [...] if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the” corporate body. See Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008), at 39.

Section 7 of the UK *Bribery Act 2010*, provides that it is offence for a corporate body to fail to prevent a person associated with the corporate body intentionally engaging in bribery. This offence is subject to a due diligence defence.

<sup>225</sup> For example, in section 78 of the *Consumer Protection Act 2007*.

<sup>226</sup> Wells, “Corporate Criminal Liability: Exploring Some Models” in Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010), at paragraph C.88, notes that health and safety offences in the UK are generally only prosecuted after other compliance mechanisms have failed.

<sup>227</sup> United States Sentencing Commission, *2014 Guidelines Manual Chapter Eight – Sentencing of Organizations*, available at <http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/2014-chapter-8>, provide that having an effective compliance and ethics programme with which an organisation exercises due diligence to prevent and detect criminal conduct will act as a mitigating factor in the assessment of sentence.

<sup>228</sup> *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267.

<sup>229</sup> [2016] IESC 30.

<sup>230</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 81.



the concept of organisational fault, rather than individual fault, allows criminal fault to be sourced within the corporate body, rather than merely ascribed to it from one of its agents.

- 8.184 Rather than focusing on individual fault like the *Nattrass* identification doctrine or the vicarious criminal liability approach to corporate liability, an organisational approach to liability considers that the corporate body itself has “its own distinctive goals, its own distinctive culture, and its own distinctive personality”.<sup>231</sup> As noted above, it is now accepted that a corporate body has the capacity to commit many of the crimes that a natural person can commit. The above analysis of the vicarious and identification models demonstrates that the traditional liability attribution models are unable to identify subjective forms of criminal fault on the part of the corporate body, independently from the fault of any of its agents. Organisational liability allows subjective fault elements to be sourced directly from the corporate body based on an identifiable culture within that organisation, without recourse to deriving such fault from the organisation’s agents.
- 8.185 Organisational liability sees corporate criminal wrongdoing as a cultural failure of the organisation itself, a systemic problem.<sup>232</sup> Rather than the corporate body being liable because of the acts of individual offenders, this model attributes criminal liability based upon corporate policies, procedures, practices and attitudes, deficient chains of command and oversight, and corporate cultures that tolerate or encourage criminal offences.<sup>233</sup> Applying an organisational liability model means that if the corporate body’s organisation or behaviour has promoted or facilitated criminal offences, the corporate body must share in the blame for the criminal offences because it is (at least in part) responsible.<sup>234</sup>
- 8.186 Corporate bodies act through their agents and employees. Although an organisational liability model allows the fault element of a crime to be sourced with the corporate body alone, the conduct element of the offence will have to be executed (by act, conduct leading to a result, or omission) by one agent, or many agents, of the body. However, proponents of an organisational model argue that this reliance on natural persons is not at odds with the use of an organisational liability model. Organisational liability recognises that a corporate body must interact with individuals: Corporate culture affects the actions of individuals, and the actions of individuals affect the culture of the corporate body.<sup>235</sup> However, the manner in which these interactions operate is ultimately controlled by those

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<sup>231</sup> Gobert and Punch, *Ibid.* at 38; for further analysis of this distinction between the individualist (“normalist”) approach and the organisational (“realist”) approach, see Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability” (2007) 18 *Criminal Law Forum* 267.

<sup>232</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at paragraph 1.88.

<sup>233</sup> Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008) at 6.

<sup>234</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 80.

<sup>235</sup> Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability” (2007) 18 *Criminal Law Forum* 267, at 276.

who manage the organisation. It is open to these controlling managers to organise the corporate body to avoid or mitigate the specific organisational characteristics that are recognised as giving rise to the risk of criminality. Should the corporate body fail to act to avoid a culture that enables criminality, an organisational liability model provides that the corporate body can be punished for this “choice”, and can avoid further punishment by making better “choices” in the future.<sup>236</sup>

- 8.187 The offences that a corporate body will be at greater risk of committing will vary, largely depending on the nature of the business in which the corporate body is engaged. Organisational liability models have been used both as part of general non-generic schemes of corporate liability (such as in the *Australian Criminal Code Act*), and in offence-specific schemes of liability (such as in the UK *Corporate Manslaughter and Corporate Homicide Act 2007* and the model proposed in the draft *Corporate Manslaughter Bill 2005* appended to the Commission’s *Report on Corporate Killing*).<sup>237</sup> Regardless of the nature of both the crime that the corporate body is at risk of committing and the nature of the model for the attribution of liability, the organisational fault of the corporate body will be based on the body’s “culpable failure to take appropriate steps to prevent criminal harm that could have been averted had proper attention been paid to the task.”<sup>238</sup>

#### (a) Criticism of the Organisational Approach

- 8.188 Corporate crime often occurs because of a breakdown in the orderly operations of the business. *R v P & O European Ferries (Dover) Ltd*<sup>239</sup> and *R v Great Western Trains Company (GWT)*,<sup>240</sup> discussed above, demonstrated that individual wrongful actions and omissions in corporate systems may act in combination to produce what would be (but for the absence of an organisation model of liability attribution) a criminal outcome. *P&O* and *GWT* demonstrated that attempting to source criminal fault in a single individual for failures of a cumulative nature will not be possible. An organisational model of liability attribution, in identifying a corporate body’s fault through examination of the body’s policies, procedures, and/or culture, is equipped to recognise an aggregation of fault. This recognition would allow the acts, omissions and mental states of more than one person within the corporate body to be combined in order to determine the criminal fault and conduct of the body in a holistic sense.<sup>241</sup>
- 8.189 The concept of allowing aggregated fault to satisfy subjective fault elements has been criticised, however. Ormerod and Laird have argued that “it is not possible artificially to

<sup>236</sup> Clough, *Ibid.*

<sup>237</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005).

<sup>238</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 81.

<sup>239</sup> *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App 72.

<sup>240</sup> *R v Great Western Trains Company (GWT)*, English Central Criminal Court, 30 June 1999; see Celia Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 112.

<sup>241</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 83.

construct the *mens rea* in this way [...] [t]wo (semi) innocent states of mind cannot be added together to produce a guilty state of mind."<sup>242</sup> This prohibition has been recognised by the courts of England and Wales.<sup>243</sup> An argument against aggregated fault is that the criminal law will generally require proof of both the personal fault (*mens rea*) and criminal conduct (*actus reus*) on the part of the corporate person. A prosecution that relies on the evidence of fault of another natural person (even if that natural person is a servant or agent of the corporate body, who played a role in the culpable decision-making of the corporate body) cannot suffice.<sup>244</sup>

8.190 This argument builds on an individualist view of criminal law. It is correct to point out that the guilt of an individual is, by definition, personal, and that to convict an individual based upon the guilt of another person would, in general,<sup>245</sup> be unjust. However, it has been argued that to extend this logic to prohibit the aggregation of fault within a corporate body is to misconceive this aggregation.

8.191 The aggregation of corporate fault is not intended to allow for the conviction of the corporate body on the basis of another's fault. Rather, it is intended to allow for the accurate assessment of the full nature of the corporate body's fault.<sup>246</sup> The concept of sourcing culpability in a function of the corporate body has been accepted by the courts of England and Wales in their recognition of the "directing mind and will" of the corporate body being a senior officer of the body acting as the body. It has been argued that allowing for an aggregation of fault is merely a more accurate means to assess this fault, in circumstances where it is recognised that "individuals within a company contribute to whole machine, it is the whole which is judged, not the parts."<sup>247</sup>

8.192 In *United States v Bank of New England NA*,<sup>248</sup> the US federal Court of Appeals for the 1<sup>st</sup> Circuit recognised the concept of aggregated fault while applying an organisational model of liability. This was a prosecution of a bank for the offence of wilfully failing to file certain Currency Transaction Reports (CTRs). The Court observed that "if employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all." Regarding the intention element of the offence, the

<sup>242</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 299.

<sup>243</sup> *Armstrong v Strain* [1952] 1 KB 232, Devlin J: "There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge, or [...] state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind."

<sup>244</sup> See the judgment of Birmingham LJ in *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App Rep 10.

<sup>245</sup> This is the basis of the criticisms of vicarious criminal liability and absolute criminal liability considered above. While this injustice is recognised, it is also noted that holding an individual liable in absence of their personal guilty mind can be justified in some circumstances on public good grounds.

<sup>246</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 83.

<sup>247</sup> Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 156.

<sup>248</sup> *United States v Bank of New England NA* 821 F2d 844 (1st Cir 1987).

Court held that the prosecution would be required to demonstrate that the criminal conduct was the result of “some flagrant organizational indifference”, which could be proved, or disproved, by reference to the defendant’s effort to inform its employees of the law and to check on their compliance; its response to various bits of information that it received; its policies, and how the defendant implemented its policies.<sup>249</sup>

- 8.193 An organisational management approach has been central to the legislation on occupational safety and health for many years. The *Safety, Health and Welfare at Work Act 2005* requires all employers to have an internal, risk-based, safety management system that is based on typical corporate organisational arrangements, including the delegation of specific tasks to named persons.<sup>250</sup> Risk-based management systems have also become a feature of financial services legislation and associated Central Bank statutory codes.<sup>251</sup> These legislative provisions in turn reflect the literature on how successful modern corporate bodies actually operate, as is apparent from the consideration of corporate decision-making outlined above.
- 8.194 Various different models of organisational corporate liability have been adopted or proposed in different jurisdictions around the world, used both as part of general non-generic schemes of corporate liability, and statutory and offence specific schemes. The Commission considers below a number of these models in order to determine if an organisational model of corporate liability may form part of a general scheme of liability in this jurisdiction.

**(b) Organisational Model as part of an offence/legislation specific model of liability**

*(i) Ireland*

- 8.195 In its 2005 *Report on Corporate Killing*, the Commission recommended a model for attributing liability that involves some reference to the activities of senior managers, but which consists primarily of an organisational model. This offence-specific scheme of liability provides a method for a corporate body to be held criminally liable for manslaughter resulting from the gross negligence of the corporate body. In attributing criminal fault to the corporate body, this model permits consideration of a comprehensive

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<sup>249</sup> See *Ibid.* at 855.

<sup>250</sup> Section 20 of the *Safety, Health and Welfare at Work Act 2005*, replaced and incorporated comparable provisions in section 12 of the *Safety, Health and Welfare at Work Act 1989* and Regulations 5 to 10 of the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (SI No 44 of 1993). Failure to comply with these requirements is an offence: see section 77 of the 2005 Act.

<sup>251</sup> See the Central Bank’s *Corporate Governance Code for Credit Institutions and Insurance Undertakings 2013* (Central Bank of Ireland 2013).

list of “corporate culture” factors,<sup>252</sup> such as internal governance systems, as well as the role of “high-managerial agents”.

- 8.196 The Commission’s 2005 Report dealt specifically with gross negligence manslaughter, where the basis for imposing criminal liability is falling far below the standard of care expected. “Corporate culture” factors (such as those outlined in the draft Bill appended to the 2005 Report) may be of assistance in framing part of a non-generic corporate liability scheme, as a general model for other gross or simple negligence based offences, with some modifications. However, a model such as the one outlined in the Commission’s 2005 Report focuses on objective fault, and so does not assist in remedying the significant issue of attributing subjective criminal fault to a corporate body. Many offences that a corporate body may be at greater risk of committing, such as fraud-related offences, require proof of intention or knowledge.
- 8.197 The corporate manslaughter offence outlined in the 2005 Report is a result-based offence (the corporate body’s conduct must lead to the death of a human person). The offence-specific liability attribution model provided in the 2005 Report allows for the conduct element of the corporate manslaughter offence to be attributed directly to the corporate body, whether the result in question comes about due to an act or an omission. The 2005 Report indicates that, should the corporate body choose to organise its operations in such a grossly negligent way as to allow its employees, by way of act or omission, to conduct themselves in a manner that contributes to the death in question, the normal rules of causation will allow that conduct to be attributed to the corporate body even though there was employee conduct involved.<sup>253</sup>
- 8.198 A benefit of this method of attributing conduct to the corporate body is that the criminal conduct does not need to be identified in an individual agent, as is required by the identification doctrine or vicarious criminal liability approach. Rather, it allows for discrete pieces of conduct (acts or omissions) on the part of a corporate body’s agents, to contribute towards the criminal result in question.<sup>254</sup>
- 8.199 This model specifically provides for liability to be imposed upon the corporate body based upon a gross negligence level of culpability. This is a level of objective fault that requires a

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<sup>252</sup> These factors are outlined in the draft *Criminal Law (Corporate Manslaughter) Bill* appended to the 2005 Report.

<sup>253</sup> The criminal law has demonstrated an ability to ensure that liability is imposed upon a corporate body even though the act or result based conduct elements of offences must be committed on the body’s behalf by an agent or employee, through demonstrating a resistance to imposing the traditional doctrine of voluntary intervening acts (*novus actus interveniens*). See Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at 61-62; McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at 270-271.

<sup>254</sup> Law Commission of England and Wales, Consultation Paper on *Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 107.

greater level of culpability than is required in simple negligence based offences. To satisfy this standard the corporate body must fall far below its duty to act reasonably.<sup>255</sup>

8.200 As gross negligence is a higher level of culpability than simple negligence, it is more burdensome for a prosecution to prove. Acting unreasonably<sup>256</sup> or with simple negligence<sup>257</sup> are much more commonly used fault elements in criminal offences than gross negligence. The liability model set out in the 2005 Report would not, therefore, by itself form a suitable basis for the sole model of attributing objective fault to corporate bodies in a general scheme of corporate liability. This model would require proof of gross negligence for all objective fault based offences, even those which do not require proof of such a high level of culpability. This would create a disparity of culpability between the fault required of natural person defendants, and that required of legal person defendants. This disparity would also place an unjustified additional burden on the prosecution in trials for objective fault based offences that do not require as high a level of culpability as gross negligence.

8.201 The liability model outlined in the Commission's 2005 Report may not be a suitable basis for the sole model of attributing objective fault to the corporate body. However, it may be a suitable basis for a general model for attributing gross negligence to a corporate body within a non-generic scheme of corporate liability attribution, without need for a great level of modification. The Commission is of the view that this level of culpability should be catered for within any new scheme of corporate criminal liability attribution. However, such a scheme must also include a model that allows liability to be imposed upon a corporate body upon the basis of simple negligence (and similar unreasonableness-based fault elements).

8.202 Again, as the 2005 Report's model is designed to cater for the decision-making realities of corporate bodies, it may also be suitable for use as the basis for a generally applicable simple negligence model, if modified to remove the requirement that the defendant fell far below a standard of care owed.

(ii) *The UK Corporate Manslaughter and Corporate Homicide Act 2007*

8.203 The UK *Corporate Manslaughter and Corporate Homicide Act 2007* specifically deals with manslaughter in which liability is based upon gross negligence. As such, while this model

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<sup>255</sup> Section 3(2)(c) of the *Draft Corporate Manslaughter Bill 2005* provides that "the breach of duty was of a very high degree and involved significant risk of death or serious personal harm".

<sup>256</sup> For example, the offence set out in section 15(17) of the *Criminal Justice Act 2011*, which provides that "A person who without reasonable excuse fails or refuses to comply with an undertaking given by him or her under subsection (8)(b)(ii) shall be guilty of an offence [...]" (emphasis added).

<sup>257</sup> For example sections 8(1) and 77(2)(a) of the *Safety, Health and Welfare at Work Act 2005*. Section 8(1) provides for a general duty that "[e]very employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees." (emphasis added). Section 77(2)(a) makes it a criminal offence to fail to discharge this duty.

may be of influence in formulating part of a general scheme of corporate liability (that is, formulating a model which targets objective-fault based offences), it does not allow for the imposition of subjective fault to the corporate body, and cannot provide a good basis for a generic scheme of corporate liability.<sup>258</sup>

- 8.204 While the general scheme of liability applicable in the UK is the approach laid down in *Meridian*, in 2007 the UK Parliament introduced an offence specific organisational model of corporate liability in the UK *Corporate Manslaughter and Corporate Homicide Act 2007*.<sup>259</sup> As with the offence in section 7 of the *Bribery Act 2010* (considered above), this scheme arose due to “widespread criticism of common law models of corporate liability.”<sup>260</sup>
- 8.205 A “cultural shift”<sup>261</sup> in how corporate bodies should be treated by the criminal law in the UK led to the enactment of the 2007 Act. The aim of the Act is to use mainstream criminal law as a tool to prosecute corporate bodies who engage in commercial activity, but who, in a grossly negligent manner, fail to ensure the safety of their agents while engaging in that activity. The 2007 Act was also intended to reinforce health and safety regulation by providing for criminal enforcement higher up the enforcement pyramid.<sup>262</sup>
- 8.206 The 2007 Act provided for a statutory offence of corporate manslaughter.<sup>263</sup> The liability model used in the 2007 Act is similar to the offence of gross negligence manslaughter present in Irish common law,<sup>264</sup> but includes additional “organisational” considerations that:
- (1) the breach of the duty must be as a result of the way an organisation’s activities are managed or organised; and

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<sup>258</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No195 2010) at 107, argue that subjective fault (intention or knowledge) can only be shared by individuals consciously or by an act of their will, as distinct from gross negligence which may be inferred by “putting together discrete pieces of conduct that are not in that same sense part of a shared consciousness”, and due to this, the approach taken by the 2007 Act will not be suitable to all crimes involving proof of subjective fault.

<sup>259</sup> The 2007 Act does not replace the general common law provisions for corporate liability, which continue to apply unless dis-applied by statute.

<sup>260</sup> Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 849, at 849-878.

<sup>261</sup> As a result of a series of transport disasters in the 1990s in the UK (including those which formed the basis of *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App 72 and *R v Great Western Trains Company (GWT)*, English Central Criminal Court, 30 June 1999; see Celia Wells, *Corporations and Criminal Responsibility* 2nd ed (OUP 2001) at 112.

<sup>262</sup> Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 849, at 853; also see Chapter 2 for a discussion of the enforcement pyramid.

<sup>263</sup> See Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 652-653, for a breakdown of the elements of this offence.

<sup>264</sup> As outlined in *the People (Attorney General) v Dunleavy* [1948] IR 95, and discussed further on in this chapter.

- (2) a substantial element of the breach of the duty must be due to the way the senior management managed or organised activities.<sup>265</sup>

8.207 It is notable that the first “organisational” consideration does not focus on a particular level of management (as the identification doctrine does). Rather, it allows account to be taken of the organisation or management of the corporate body, allowing for the consideration of more than one individual shortcoming or systemic shortcomings, in assessing the negligence of the body as a whole.<sup>266</sup> In this way, the 2007 Act incorporates the concepts of organisational and aggregated fault. However, this organisational assessment of the corporate body is qualified by the second outlined consideration, which does require a focus on the interaction of senior management with the breach.<sup>267</sup>

8.208 This requirement does not have the effect of confining the attribution of liability to the apex of the management hierarchy to the same extent as the *Nattrass* identification doctrine. Senior management’s contribution need not be total. However, this requirement still imposes a restriction on the imposition of liability using this model.<sup>268</sup> As a result, the application of this qualified organisational model of liability is narrower than the Australian “pure” model of organisational liability (considered below), which allows for liability to be based solely on the organisational fault of the corporate body, without necessarily requiring reference to senior management activity or state of mind (though these will almost certainly be relevant).

8.209 The 2007 Act expressly provides that the Court may take account of organisational failure to comply with health and safety legislation, including consideration of “attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure [...] or to have produced tolerance of it.”<sup>269</sup>

8.210 Like the offence recommended by the Commission in its 2005 Report, this corporate manslaughter offence is a result based offence. The model in in the 2007 UK Act allows for the aggregated grossly negligent conduct of the corporate body’s agents that led to the

<sup>265</sup> Section 1(3) of the Act of 2007.

<sup>266</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 655.

<sup>267</sup> Section 1(4)(c) of the Act of 2007 provides that “Senior management” is defined as:

“the persons who play significant roles in—

- i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- ii) the actual managing or organising of the whole or a substantial part of those activities.”

<sup>268</sup> The contribution of other employees or agents of the corporate body is also relevant. So long as the employee or agent’s impact does not render the contribution of senior management as being less than substantial, it will still be taken into account. However, the effect of this requirement is to provide a barrier to imposing liability where it cannot be demonstrated that senior management failure is not substantially responsible for the gross negligence of the corporate body that led to the offending result (the death of a person).

<sup>269</sup> Section 8(2)(3)(a) of the UK *Corporate Manslaughter and Corporate Homicide Act 2007*.



criminal result to be attributed to the corporate body, so long as the conduct of a senior manager substantially contributed to that result.

8.211 This liability model has been criticised for leaving the issue of causation of the criminal result under-defined. The 2007 Act requires proof that the death was caused by the way in which a body managed or organised its activities.<sup>270</sup> Causation difficulties may arise (particularly in the prosecutions of large public authorities or corporations) because organisations act through individuals. This has led to the courts noting a potential for difficulty in causatively linking corporate organisation to the death of an individual.<sup>271</sup> Notwithstanding this potential difficulty, the courts have demonstrated that they are willing to take a “common sense” approach to attributing causal responsibility to a culpable party, rather than taking an overly strict approach to breaking the chain of causation.<sup>272</sup> Such a “common sense” approach to causation is required in order for the criminal law to be effective in relation to corporate offenders, due to the incorporeal nature of corporate bodies. However, as discussed above, including such flexibility in the criminal law may offend against the legality principle.

8.212 The liability model provided in the 2007 Act is also subject to similar criticism as the common law approach to corporate liability. Like the identification doctrine, this model requires a “substantial” contribution to a breach flowing from senior management. This perpetuates or continues the paradox that flows from the identification doctrine, that smaller corporate bodies remain easier to prosecute than large ones. It has been noted that this “achieves little”, as in those cases the legal separation of the companies and the officers that run them is merely “notional”.<sup>273</sup>

### **(c) Organisational Model as part of general scheme of liability**

#### **(i) *The Australian Criminal Code Act (C'th) 1995***

8.213 *The Australian Criminal Code Act (C'th) 1995* provides for an organisational model of corporate criminal liability, based on the concept of “corporate culture”. It has been described as a “leading example”,<sup>274</sup> “commendable”,<sup>275</sup> “arguably the most sophisticated

<sup>270</sup> Section 1 of the UK *Corporate Manslaughter and Corporate Homicide Act 2007*.

<sup>271</sup> In *R v Kennedy* [2007] UKHL 38; [2008] 1 AC 269 (on appeal from: [2005] EWCA Crim 685), the House of Lords quashed a corporate manslaughter conviction, holding that “causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises”. See also Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 849, at 855-856.

<sup>272</sup> McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at 270-271.

<sup>273</sup> Wells, “Corporate criminal liability: a ten year review” [2014] Crim LR 849, at 853.

<sup>274</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 199.

<sup>275</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 74.

model of corporate criminal liability in the world”,<sup>276</sup> and “ambitious and progressive [...] in particular [providing for] liability based on a corporate culture conducive to the criminal conduct in question.”<sup>277</sup>

- 8.214 However, since this model’s introduction in 1995, there have been no reported cases of the Code in operation. As such, it is not certain how this organisational liability model will work in practice.
- 8.215 Under the Australian system, general criminal law is administered at state level. The federal courts retain only limited criminal law jurisdiction.<sup>278</sup> The introduction of this model of corporate liability attribution was part of a general reform, and codification, of the criminal law at the Australian federal level.<sup>279</sup>
- 8.216 The Code provides for a corporate body being held directly liable for federal criminal offences<sup>280</sup> if its organisation, including its corporate culture, “directs, encourages, tolerates or leads” to the commission of the offence. It allows a court to consider matters such as practices, training systems, procedures, and communication systems, with the aim of discovering whether the corporate body has permitted or authorised a criminal offence.<sup>281</sup>
- 8.217 Division 12 of the *Australian Criminal Code Act (C’th) 1995* provides the Australian Federal jurisdiction’s general scheme of corporate criminal liability. Section 12.1 provides that the Code applies to corporate bodies in the same way as it applies to individuals, and that a corporate body may be found guilty of any offence under the Code, including offences

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<sup>276</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 138.

<sup>277</sup> OECD (Directorate for Financial and Enterprise Affairs), *Australia: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (4 January 2006).

<sup>278</sup> Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008) at 15.

<sup>279</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-general, *Model Criminal Code Ch.2, General Principles of Criminal Responsibility, Final Report*, Attorneys-General’s Dept., 1993; see also Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability” (2007) 18 *Criminal Law Forum* 267, at 277.

<sup>280</sup> Australia is a federal system in which the Commonwealth has legislative power only in respect of certain specified matters. These do not include general criminal law so that the majority of criminal law in Australia is State law. The Australian states and territories have generally followed the identification doctrine as developed by the UK courts, rather than an organisational model. See Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008) at 10, paragraph 3.1.

<sup>281</sup> Section 12.2 of the *Australian Criminal Code Act 1995*.

punishable by imprisonment.<sup>282</sup> This is the same position as is currently applied to corporate bodies in this jurisdiction.

8.218 The Code expressly provides for the attribution of criminal conduct to the corporate body. Section 12.2 provides that the corporate body will be held vicariously liable for the conduct element of an offence committed by an employee, agent or officer of a corporate body.<sup>283</sup> The use of vicarious liability, in attributing the conduct element of offences, is justified because the organisational method of discerning the fault of the corporate body is faithful to the actual decision-making methods of corporate bodies. As a result, there is little danger of imposing liability on the corporate body, based upon the actions of its agents, where corporate blameworthiness has not been established.<sup>284</sup>

8.219 One criticism of section 12.1 is that it does not expressly provide for the aggregation of conduct by providing that the employee, agent or officer can act “individually or collectively”,<sup>285</sup> which qualifies the circumstances in which liability can be imposed on the corporate body.

8.220 The Code provides for the attribution of the fault element of an offence in two sections. Section 12.3 relates to offences that require proof of a subjective fault element (intention, knowledge, subjective recklessness). Section 12.4 provides for the attribution of criminal negligence to the corporate body.

(ii) *Subjective fault based offences*

8.221 Section 12.3(1) provides that: “If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly *authorised or permitted* the commission of the offence.” (emphasis added).

8.222 The Australian Code essentially construes the “intention, knowledge or recklessness” element that would apply to a natural person, as an “authorisation or permission” element for the corporate body.<sup>286</sup> “Permission” is used to mean expressly or implicitly

<sup>282</sup> Section 4B of the (*Australian Crimes Act 1914*) enables a fine to be imposed for offences that only specify imprisonment as a penalty.

<sup>283</sup> Section 12.2 provides that “If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.” This is a narrower band of potential perpetrators than that incorporated by section 7 of the UK *Bribery Act 2010* (see above regarding the broad definition of an “associated person”).

<sup>284</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 140.

<sup>285</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 139; the inclusion of “individually or collectively” was recommended by the Law Reform Commission of Canada, *Recodifying Criminal Law* (Report No. 31 1987), cl. 22(2)(a), in order to overcome having a similar difficulty in the *Canadian Criminal Code*.

<sup>286</sup> Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability” (2007) 18 *Criminal Law Forum* 267, at 280.

giving permission, rather than passively permitting the offence to occur, as in a “failure to prevent” type offence.<sup>287</sup>

8.223 This approach could be criticised for lowering the level of culpability required of a corporate body in order to commit a specific offence, from the level required of a natural person for the same offence. However, as noted above, a corporate body cannot intend, know or subjectively disregard risk in the same manner as a natural person. Some modification of the culpability required of a corporate body is, therefore, required in order to allow subjective culpability to be identified directly within a corporate body, rather than attributed to that body from one of its agents (as is the method for the identification doctrine and vicarious liability doctrine).

8.224 The Code provides that the authorisation or permission of the commission of the offence can be inferred from features of corporate culture. Corporate culture is defined as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place”. Section 12.3(2) sets out the grounds for inferring authority to commit the offence from the corporate culture:

- (1) proving that the corporate body’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (2) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (the Code provides that the corporate body defendant has access to a due diligence defence in relation to this ground)<sup>288</sup>; or
- (3) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (4) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.<sup>289</sup>

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<sup>287</sup> Commonwealth Attorney-General’s Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) at 313.

<sup>288</sup> Section 12.3(3). Note that paragraph (b) “does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission”. This provision appears to provide the corporate body with a defence where it has taken reasonable steps, and a high managerial agent is acting as a “rogue agent”.

<sup>289</sup> The Explanatory Memorandum, *Criminal Code Bill 1994 (Cth)* 44: provides that “For example, employees who know that if they do not break the law to meet production schedules (for example, by removing safety guards or equipment) they will be dismissed. The company would be guilty of intentionally breaching safety legislation.”

8.225 Grounds (1) and (2) bear similarity to the identification doctrine as they focus on the conduct and fault of agents at the apex of the corporate body's managerial structure. Grounds (3) or (4) allow for a more organisational analysis of the corporate body's fault. The Code notes that these grounds may include consideration of the following relevant factors:

- (1) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (2) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(iii) *Negligence-based offences*

8.226 Section 12.4(1) of the Code provides that an offence with negligence as its fault element applies to a corporate body in the same manner that it applies to a natural person. A corporate body will be negligent with respect to a physical element of an offence if its conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.<sup>290</sup> This is the same test of criminal negligence that had been used by the common law prior to the *Criminal Code Act* coming into force.<sup>291</sup> This is an objective test, which does not require the defendant to have been aware of the risk of the conduct element.

8.227 Specifically, in relation to corporate bodies being prosecuted for a negligence-based offence, section 12.4(2) provides:

"If:

(a) negligence is a fault element in relation to a physical element of an offence;

and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that

<sup>290</sup> Section 5.5.

<sup>291</sup> *Nydam v R* [1977] VR 430, 445 (Young CJ, McInerney J and Crockett J) – this case outlined the test of criminal negligence, in relation to the common law offence of murder by recklessness.

is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”

8.228 This form of negligence is similar to that in the Irish common law offence of gross negligence manslaughter, as set out in *The People (Attorney General) v Dunleavy*.<sup>292</sup> This definition of criminal negligence was approved by the Commission as a fault element for the recommended statutory offence of gross negligence corporate manslaughter.<sup>293</sup>

8.229 It is notable that this provision, unlike the subjective fault provision, does expressly provide for the “aggregation” of fault, based upon the conduct of the corporate body “when viewed as a whole”. This means that in addition to the vicarious attribution of conduct provided by section 12.2 (which applies to both the subjective and objective fault liability models) the negligence model allows for aggregated conduct (“of any number of its employees, agents or officers”) which leads to a criminal result being attributed to the corporate body.

8.230 In its *Consultation Paper on Corporate Killing*, the Commission previously noted that aggregation is only one way of attributing fault under this provision which, “[i]n short, [...] leaves the question of what constitutes negligence largely open and to the discretion of the court.”<sup>294</sup>

#### **(d) Analysis of the Australian Criminal Code Approach**

8.231 The liability model provided in Division 12 is based upon, and is largely similar to, the model contained in the *Australian Model Criminal Code*, prepared by the Standing Committee of Attorneys-General. The reason for the adoption of an organisational model of liability was that the identification doctrine was no longer viewed as an appropriate

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<sup>292</sup> *The People (Attorney General) v Dunleavy* [1948] IR 95.

<sup>293</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at paragraph 1.53.

<sup>294</sup> Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) at paragraph 6.12: “aggregation is identified only as a means of attributing negligence to a corporation - whether a corporation, when viewed as a whole, has actually been negligent is determined by reference to paragraph (3) which is non-exhaustive. In short, the provision leaves the question of what constitutes negligence largely open and to the discretion of the court.”

basis for corporate criminal liability, given the “‘flatter structures’ and greater delegation to relatively junior officers in modern corporations.”<sup>295</sup>

- 8.232 This organisational model was preferred over a model in which the corporate body would be held vicariously liable for the fault and conduct of an employee or agent of the body, subject to a due diligence defence.<sup>296</sup> The organisational model was seen as fair, practical and “realistic” scheme of corporate criminal responsibility “which as nearly as possible adapted personal criminal responsibility to fit the modern corporation”, though it was noted that relying on the concept of “‘corporate culture’ will strike some as too diffuse”.<sup>297</sup>
- 8.233 As noted above, there are no reported cases of the Code in operation, so it is not certain how the organisational liability model works in practice.<sup>298</sup> This absence of practical demonstrations as to how “corporate culture” might be proved is of concern, as the “corporate culture” concept has been accused of suffering from “inherent ambiguity”.<sup>299</sup> A submission received by the Commission in response to the Issues Paper for this project,<sup>300</sup> noted concern regarding the ability of a prosecuting body to enforce this provision, due to its reliance on “corporate culture”.
- 8.234 The Code can also be criticised for reducing the threshold as to what constitutes subjective fault for the corporate person. The Code is intended to apply to offences that

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<sup>295</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-general, *Model Criminal Code Ch.2, General Principles of Criminal Responsibility, Final Report* (Attorneys-General's Department 1993).

<sup>296</sup> Similar to the model adopted in section 7 of the UK *Bribery Act 2010*.

<sup>297</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-general, *Model Criminal Code Ch.2, General Principles of Criminal Responsibility, Final Report*, (Department of Attorneys-General 1993).

<sup>298</sup> One of the reasons for its lack of application is that it is frequently specifically exempted from application by legislation (For example: section 15 of the *(Australian) Occupational Health and Safety (Commonwealth Employment) Act 1991 (C'th)*; section 6AA of the *(Australian) Trade Practises Act*; section 8ZD(3) of the *(Australian) Taxation Administration Act 1953 (C'th)*; section 769A of the *(Australian) Corporations Act*; section 12GH(6) of the *(Australian) ASIC Act*). Another reason for this lack of application appears to be that, where pre-existing legislation has provided for an offence or legislation specific model of corporate liability, this was allowed to remain, while the Code model only is left to apply as a default model of liability where there is no alternative model. While this may not be a ringing endorsement for the Code's model of liability, it might be explained by the relevant convenience of leaving pre-existing models of liability in place, rather than having to amend significant amounts of legislations (see Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 138).

<sup>299</sup> See Coffee, “Corporate Criminal Liability: An Introduction and Comparative Survey” in Eser, Heine and Huber (eds) *Criminal Liability of Collective Entities* (Freiburg 1999) at 9. Sarre, “Penalising Corporate ‘Culture’” in Gobert and Pascal (ed), *European Developments in Corporate Criminal Liability* (Routledge 2011) 84, at 93, argues that even if no prosecutions are ever brought based on a company's deficient “corporate culture”, it does not follow that the “corporate culture” initiatives can be judged a failure as the provisions have raised the importance of a corporate body's culture.

<sup>300</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8 - 2016).

require proof of criminal intent rather than only strict liability offences.<sup>301</sup> However, as a corporate body does not have a state of mind in the way that a human person does, it cannot make distinctions between intentional and reckless behaviour. The focus on corporate culture to prove offences could, therefore, be said to reduce the threshold of what a prosecution must prove.

## 7. Other General Schemes of Corporate Liability

### (a) The Criminal Code of Canada

- 8.235 The *Criminal Code of Canada* provides for a broad non-generic scheme of corporate criminal liability that includes separate models for dealing with subjective and objective fault. This approach is relatively simple, while also catering for a full range of offence types.<sup>302</sup>
- 8.236 In Canada, the criminal law has been codified in the *Criminal Code of Canada* and is exclusively a federal competence.<sup>303</sup> Under the Canadian Code, corporate bodies are included in the definition of “persons” who are capable of committing a criminal offence.<sup>304</sup> The provisions of the Code dealing with the criminal liability of organisations came into effect on the 31 March 2004.
- 8.237 The main driver behind the reform of the corporate criminal liability scheme in Canada was the *Westray Mine* incident of May 1992, which resulted in the deaths of 26 mineworkers following an explosion. The Report, following a public inquiry into this incident, summarised the causes of the incident as “incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference”.<sup>305</sup> These are terms that might be used to describe situations of collective or aggregate failure.
- 8.238 In the ensuing debate as to what form a revised model of corporate liability should take, the US’s *respondeat superior* model was rejected because “it would be wrong in principle

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<sup>301</sup> Commonwealth of Australia, *Parliamentary Debates, Senate*, 30 June 1994 (Senator Crowley, Minister for Family Services) cited in Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations” prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson, 2008) at fn 31.

<sup>302</sup> See Law Commission, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 204.

<sup>303</sup> Provincial legislatures do retain power to enact penal provisions in relation to provincial legislation; otherwise, the criminal jurisdiction is federal.

<sup>304</sup> *Canadian Criminal Code*, RSC 1985, c C-46, section 2.

<sup>305</sup> Richards, *The Westray Story: A Predictable Path to Disaster, Report of the Westray Mine Public Inquiry Volume 1* (1997) at ix.



to impose the stigma of a criminal offence on a corporation when its actions are not morally blameworthy.”<sup>306</sup>

8.239 The scheme of corporate liability in the *Australian Criminal Code Act 1995* was also rejected, on the grounds that the incorporation of “corporate culture” into the proofs of an offence would not simplify the investigations or prosecutions of corporate crime, and may in fact prolong and complicate them. The Canadian government sought to identify a clearer scheme, which departed less from general legal principles.<sup>307</sup>

8.240 For subjective-fault based offences, the Canadian Government opted to retain a model that focused on the fault or conduct of senior officers in the corporate body, similar to an expanded identification doctrine.<sup>308</sup> Unlike the *Nattrass* identification doctrine, considered above, this model was formulated to give greater regard to the organisational realities of modern corporate bodies. This modification allows for the directing mind and will of the corporate body to be found in an expanded class of people beyond the boardroom limits suggested by *Nattrass*.<sup>309</sup>

8.241 The *Criminal Code of Canada* differs from the *Australian Criminal Code*, in that it does not provide for the means of attributing the conduct element of an offence to the corporate body separately from the means of attributing the fault element of an offence. The Canadian Code provides for the attribution of subjective fault and objective criminal negligence to the corporate body separately.

(i) *Subjective fault based offences*

8.242 In respect of an offence that requires the prosecution to prove subjective fault, section 22.2 provides that the organisation is a party to the offence if:

- (1) One of the “senior officers” of the organisation has the “intent at least in part to benefit the organisation”; and
- (2) That officer meets one of the following three requirements:
  - a. he or she is acting within the scope of their authority, and/ or is a party to the offence;

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<sup>306</sup> *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights: Corporate Liability* (November 2002), The Vicarious Liability Model Chapter, available at <http://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/jhr-jdp/index.html>.

<sup>307</sup> See, *Ibid.* Corporate Culture Approach and C-284 Chapter.

<sup>308</sup> For a more detailed consideration of the discussions which lead to the introduction of this model of liability, see Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations” prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business (Allens Arthur Robinson 2008), section 5.

<sup>309</sup> *Ibid.* paragraph 5.4.

- b. he or she has the mental state required to be a party to the offence and, acting within the scope of their authority, directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
- c. he or she knows that a representative of the organisation is or is about to be a party to the offence, and does not take all reasonable measures to stop them from being a party to the offence.

8.243 The definition of “senior officer” in the Code is broader than that indicated in *Nattrass*, as it “means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”. This definition is broadened further as “representative” is defined as meaning “a director, partner, employee, member, agent or contractor of the organization”.<sup>310</sup>

8.244 Section 22.2 does not use the traditional identification doctrine premise that the “senior officer” in question is conducting him or herself as the corporate body as a justification for attributing the officer’s fault to the body. Rather, the Canadian model incorporates the vicarious criminal liability approach’s tool that the officer must be intending to act, at least in part, “for the benefit of the organization” and (except in relation to requirement (c)) “within the scope of his or her activity”, to justify identifying the corporate body’s fault in the senior officer.

8.245 Requirement a) allows the corporate body to be held liable for the relevant officer’s criminal conduct, where that officer is a party to an offence. Both the relevant fault and conduct element of the offence must be identified within the senior officer. This ground is the limit of the *Nattrass* identification doctrine.

8.246 Requirement b) expands the circumstances in which the corporate body can be held liable, allowing the senior officer who has the relevant mental state to delegate the conduct element of the offence to another “representative” of the corporate body. This delegation allows for a separation of the fault and conduct elements of the relevant offence in a way which was not provided for under *Nattrass*. Such delegation is more representative of how modern corporate bodies operate.

8.247 Requirement c) provides for circumstances in which the senior officer will knowingly fail to take reasonable steps to prevent the criminal conduct. This expands this Canadian approach even further beyond *Nattrass*, as it again allows for a separation of the fault and conduct elements of the relevant offence. This requirement is broader than the other two, as it does not require the senior officer to be acting within the scope of his or her

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<sup>310</sup> Section 2.

authority. This ground also allows for the realistic scenario in which a senior officer, rather than actively delegating the perpetration of criminal conduct to a subordinate employ, is merely aware of the offensive conduct and fails to act to prevent it. This ground also provides for inchoate liability for the corporate body. It includes criminalising a failure to take reasonable steps where the senior officer is aware that a representative is “about to be a party to the offence”, which is a significant departure from the identification doctrine.<sup>311</sup>

8.248 In allowing for the separation of the fault and conduct elements of the offence (they need not be found in one individual), section 22.2 allows for a limited form of aggregation. The purpose of the aggregation provision in requirement b) is to cater for a situation where it is not possible to prove that an offence has been committed as the senior officer has delegated the conduct element of the offence, and the perpetrator of the offending act does not have the requisite subjective fault.<sup>312</sup>

8.249 The aggregation provisions in requirements b) and c) mitigate one of the criticisms of the *Natras* doctrine; that it could not be applied where offensive fault and conduct were not identified in one “controlling mind and will”. It does not fully address this criticism, however, as the subjective fault element of an offence must still be identified in “one” senior officer. *P&O European Ferries*, *Great Western Trains Company* and, arguably, the dispersed nature of the fault identified in the *Westray Mine* incident, demonstrate that corporate fault which leads to offensive conduct will not always be conveniently identifiable in a single officer. This criticism was not overlooked in the formulation of this corporate liability model. As will be seen below, the Canadian Government deemed it more appropriate to deal with situations of collective or aggregate fault through a separate negligence-based offences model.

8.250 Section 22.2 does not incorporate the concept of organisational fault. Rather, it continues to ascribe fault to the corporate body from one of the body’s agents. While the Canadian model of attributing subjective criminal fault to the corporate body is not an organisational model of liability, it does allow greater regard to be given to the organisational realities of a corporate body than the traditional identification doctrine, and vicarious criminal liability. In section 22.2, the Canadian government succeeded in its goal of providing a model where fault may still be located in something like a “directing mind” of the corporate body. However, it is recognised that the “directing mind” can form in the “person exercising operational authority” and that the offensive conduct can be

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<sup>311</sup> Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability” (2007) 18 *Criminal Law Forum* 267, at 290.

<sup>312</sup> Clough, *Ibid.* at 290.

committed “by lower-level employees, whether or not those employees have the intention to commit the crime as well”.<sup>313</sup>

(ii) *Negligence based offences*

8.251 In respect of an offence that requires proof of negligence, section 22.1 of the *Criminal Code* provides that an organisation commits an offence if:

- (1) acting within the scope of their authority:
  - a. one of its representatives is a party to the offence, or
  - b. two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (2) the senior officer who is responsible for the aspect of the organisation’s activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.

8.252 Section 22.1 provides for a two-limbed test for negligence, both of which must be satisfied in order for the corporate body to be held liable. The first limb requires that one or more “representatives” of the body, acting within the scope of their authority, are a party to an offence – that is, satisfy the fault and conduct element of the offence.<sup>314</sup> As such, unlike the Code’s subjective-fault based offence model, negligent conduct on the part of the corporate body can be committed by any servant or agent of the body and attributed to the corporate body, so long as that servant or agent is acting within the scope of their authority.

8.253 It is primarily through this model that the Canadian Code addresses the concept of collective or aggregated fault. An aim of the Canadian Government’s reform of the law on corporate criminal liability was to allow for the conduct and fault of one employee or officer, or the cumulative conduct and fault of several employees or officers, to contribute to liability of the corporate body “as a whole”. This is achieved through the first limb of the test, which allows liability to be imposed even in circumstances where it is difficult or impossible to prove the criminal negligence of any one individual agent of the corporate

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<sup>313</sup> *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights: Corporate Liability* (November 2002), Corporate Liability - Combining Fault and Misconduct section. Available at: <http://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/jhr-jdp/leqis.html#a2>.

<sup>314</sup> Section 2. As seen above, “representative” is defined broadly as meaning “a director, partner, employee, member, agent or contractor of the organization”.

body. This approach also prevents the avoidance of corporate liability where senior officials have taken steps to insulate themselves from awareness of breaches of duty.<sup>315</sup>

- 8.254 The second limb of the test limits the model's application by requiring that a senior officer, or senior officers acting collectively, depart from a standard of care that could reasonably be expected to prevent the conduct element of the offence. This limb essentially requires that the senior officers of the corporate body, individually or collectively, failed to take reasonable steps to prevent the offensive conduct.
- 8.255 This model of corporate negligence is similar to the model recommended by the Commission in its *Report on Corporate Killing*,<sup>316</sup> and the model in the *Australian Criminal Code Act 1995*. The manner in which the conduct element of an offence is satisfied, by the employees or agents of the corporate body, is similar for all three, as is the requirement that the corporate body falls short of the standard of care that a reasonable person would exercise in the circumstances. Unlike the Irish or Australian models, the breach of the standard of care in the Canadian model is expressly confined to being by reason of organisational management on the part of senior officers of the corporate body. In practice, however, this may not be a great distinction as the criminal negligence model recommended by the Commission applies a test of "reasonable corporate entity or reasonable corporate manager".<sup>317</sup> The level of negligence required may also be similar in the Canadian model, and the Irish and Australian models. In both the Commission's and the Australian Code's model, the corporate body's negligence must result in such a "high risk" that the conduct element exists or will exist, and that the conduct merits criminal punishment for the offence. Similarly, the Canadian model requires that the breach in question be "marked".
- 8.256 The Canadian Code mainly confines its consideration of organisational fault to negligence based offences (flowing from individual or collective failure on the part of senior management). The requirement to prove a nexus between senior management and the breach leaves the Canadian model vulnerable to the same criticisms that apply to the offence-specific model in the UK *Corporate Manslaughter Act 2007*. Both risk continuing a trend that facilitates the prosecution of smaller companies only.<sup>318</sup> The application of this model of liability is narrower than the Australian Code's model of organisational liability,

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<sup>315</sup> Clough, "Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability" (2007) 18 *Criminal Law Forum* 267, at 285; *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights: Corporate Liability* (November 2002), Corporate Liability - Combining Fault and Misconduct section, available at <http://www.justice.qc.ca/eng/rp-pr/cp-pm/cr-rc/jhr-jdp/legis.html#a2>.

<sup>316</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005).

<sup>317</sup> *Ibid.* at paragraph 1.52.

<sup>318</sup> See Wells, "Corporate criminal liability: a ten year review" [2014] *Crim LR* 849, at 853, in relation to this criticism of the UK *Corporate Manslaughter Act 2007*.

that does not require reference to senior management activity or state of mind (though these will almost certainly be relevant in the Australian model).

8.257 The Canadian Code’s method of attributing objective fault to the corporate body takes a similar approach to the Australian model, equating negligence to something like gross negligence when the defendant is a corporate body.

**(b) The United States – the American Law Institute’s Model Penal Code (MPC)**<sup>319</sup>

8.258 Section 2.07 of the American Law Institute’s *Model Penal Code* (MPC) provides for a general scheme of corporate liability incorporating 4 different models of liability.<sup>320</sup> Unlike the Canadian or Australian Codes, the *MPC* does not provide different models of liability attribution that are applied depending on the specific form of criminal fault of the offence in question (be it intention, knowledge, subjective recklessness, or objective negligence). Rather, the *MPC* provides:

- (1) a vicarious criminal liability model – to be applied to pre-existing vicarious liability offences;
- (2) a strict/absolute liability model – to be applied to pre-existing failure to discharge a specific duty offence;
- (3) a recognition of pre-existing absolute liability offences (to which vicarious liability applies); and
- (4) a “high managerial agent” model – to be applied in all other circumstances.

8.259 The *MPC* has not been adopted as law at the federal level, where vicarious criminal liability remains the general scheme of corporate liability attribution. Several states have adopted a more limited form of corporate liability, based upon the *MPC*.<sup>321</sup>

*(i) Vicarious Liability model*

8.260 The *MPC* allows for the application of vicarious criminal liability in limited circumstances.<sup>322</sup> The application of vicarious liability is generally subject to a due diligence defence.<sup>323</sup> This model is similar to the model in section 7 of the UK *Bribery Act 2010* and section 18 of the *Criminal Law (Corruption Offences) Act 2018*, but is not offence specific,

<sup>319</sup> American Law Institute, *Model Penal Code 1962*.

<sup>320</sup> This section of the Code also provides a criminal liability attribution scheme for unincorporated associations and partnerships – Section 2.07(3).

<sup>321</sup> American Law Institute, *Model Penal Code 1962*; see also Sun Beale, “The Development and Evolution of the U.S. Law of Corporate Criminal Liability”, paper presented at the German Conference on Comparative Law (September 2013) at 10.

<sup>322</sup> Section 2.07(1)(a). Only where the offence is provided by statute, otherwise than under the Code, and “a legislative purpose to impose liability on corporations plainly appears”.

<sup>323</sup> Section 2.07(5).

and so is subject to similar criticisms regarding its use as a general scheme of liability.<sup>324</sup>

This model is also distinct from section 7 of the UK 2010 Act, in that the conduct element of the offence is not deemed to have been committed directly, but is derived vicariously from an agent of the corporate body, who is operating on the body's behalf.

8.261 The logic for retaining the use of vicarious liability in the MPC is not based upon merits of this model. Rather, it is to allow for the continued prosecution of offences under "a great mass of regulatory legislation" that pre-exists the Code, where it is neither feasible to repeal or replace such legislation, nor sensible to fail to provide a means for this legislation to be prosecuted.<sup>325</sup>

(ii) *Strict/Absolute liability model*

8.262 The MPC also provides that a corporate body may be convicted of an offence that consists of an omission to discharge a specific duty imposed on the corporate body by law.<sup>326</sup> This model is narrowly applicable, and it does not apply to general duties of care. As such, it leaves corporate liability for negligence-based offences, such as negligent homicide, to be catered for by the "high managerial agent" model. This model, as will be discussed below, is designed to apply to subjective fault based offences.<sup>327</sup> The vicarious liability model and this model apply to regulatory offences and specific duty offences.<sup>328</sup>

(iii) *Pre-existing Absolute Liability offences*

8.263 The MPC recognises the application of absolute liability to a corporate body, and assumes that an absolute liability offence will apply to a corporate body (via vicarious liability)

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<sup>324</sup> See discussion on (UK) *Bribery Act 2010* and *Criminal Law (Corruption Offences) Act 2018* in the section on Failure to Prevent in this chapter, above. See also Wells, "Corporate criminal liability: a ten year review" [2014] Crim LR 849, at 864; Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 108, noted that one of the arguments in favour of the UK offence specific model was that bribery, although committed by individuals; will always be for the benefit of the corporate body. However, this is not always so, for example, in the case of fraud or manslaughter offences committed by an agent of the corporate body. For this reason, Wells has argued that this model of liability may not be suitable for use as a general scheme of corporate liability attribution.

<sup>325</sup> American Law Institute, *Model Penal Code Commentaries* (1985) Part 1 Sections 1.01-2.13 at 333-334. The American Law Institute stated that the case for this model's "elimination is not strong enough to justify the precipitate step of abolition of a liability that is presently so widespread."

<sup>326</sup> Section 2.07(1)(b).

<sup>327</sup> This model is applicable to offences that place specific duties on corporate bodies (such as a failure to file a report or return, or maintain certain records), as distinct from offences that apply duties generally (such as the US offence of negligence homicide). This model does not go into detail about the mechanism which is to be applied in attributing liability to the corporate body for this form of offence, however, given the examples of duties to which it applies, it appears to contemplate strict/absolute liability provisions similar to the failure to make annual returns offence contained in section 343 of the *Companies Act 2014*, rather than negligence based offences. Gruner, *Corporate Liability and Prevention* (Law Journal Press New York 2004), at 7-26/27, suggests that this model provides "for a limited form of corporate negligence liability" but goes on to note that "the Code is not clear about whose failure to perform such a duty will produce corporate liability".

<sup>328</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 59.

unless the contrary intention is plainly apparent from the legislative provision in question.<sup>329</sup>

(iv) *The “high managerial agent” model*

8.264 The MPC’s primary liability model provides that a corporate body may be convicted of an offence if the commission of the offence was “authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent (broadly defined) acting on behalf of the corporation within the scope of his office or employment.”<sup>330</sup>

8.265 This model departs from the federal jurisdiction’s reliance on vicarious criminal liability for the attribution of criminal fault. The terms “high managerial agent” and “agent” are broadly defined.<sup>331</sup> This allows for the application of this model where the conduct of any person authorised to act on behalf of the corporate body may fairly be assumed to represent the policy of the body. This is a generic model of liability that applies in all circumstances where the vicarious liability and negligence models do not. It is intended that this model should be retained for offences that are more serious.<sup>332</sup>

8.266 The American Law Institute adopted this model based upon a view that corporate criminal wrongdoing is seen as individual wrongdoing that, in certain circumstances, can be attributed to the corporate body, rather than a view that corporate criminal wrongdoing is seen as a systematic failure of the organisation itself.<sup>333</sup> Despite this, the American Law Institute acknowledges that organisational issues within a corporate body can result in criminality, and that the complex organisational characteristics of large corporate bodies can result in difficulties in identifying culpability in individuals, and therefore establishing individual guilt.<sup>334</sup>

8.267 The American Law Institute’s view of the corporate body requires it to focus on individuals within the corporate body as the sole source of criminal fault. The Institute relies on the acknowledged organisational issues to justify the imposition of criminal liability on the corporate body due to the practical inability to successfully hold any natural person liable

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<sup>329</sup> Section 2.07(2).

<sup>330</sup> Section 2.07(1)(c).

<sup>331</sup> Section 2.07(4)(c) provides that the definition of “high managerial agent” includes an officer of a corporation or any other agent of a corporation having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation;

Section 2.07(4)(b) provides that the definition of “agent” includes any director, officer, servant, employee or other person authorised to act on behalf of the corporation.

<sup>332</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 59.

<sup>333</sup> See Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at 27-38 for a discussion of these views.

<sup>334</sup> American Law Institute, *Model Penal Code Commentaries* (1985) Part 1 Sections 1.01-2.13, at 337-338.



in circumstances where the criminality is driven by organisational issues (a very distinct approach to that taken in the Australian Code).

8.268 The Institute suggests that many common law offences would be effectively punished and deterred by criminal prosecutions directed at individuals within the corporate body, and civil claims against the corporate body itself.<sup>335</sup> The Institute stops short of suggesting that corporate criminal liability should be altogether withheld from serious offences, opting instead for imposing liability on corporate bodies for serious offences on a restricted basis only.<sup>336</sup>

8.269 This model of liability attribution does give some regard to the organisational realities of a corporate body by recognising that offensive conduct can result from delegation of conduct, or the reckless toleration of shortcomings within the body's managerial function. Like the *Canadian Criminal Code*, this allows for separation of the fault and conducts elements of an offence and, therefore, allows for limited aggregation. The *Model Penal Code* goes further than the Canadian Code as it allows the delegation or reckless toleration to be done by the board of directors collectively, rather than requiring the identification of "one" senior officer.

(v) *Absence of a Negligence based offence model*

8.270 The *Model Penal Code's* recognises the collective fault of a board of directors or a broadly defined high managerial agent, which provides this scheme with a capacity to attach liability for organisational fault. However, the Code fails to provide for a broader model of corporate liability for negligence based offences. This renders it subject to a similar criticism to the *Canadian Criminal Code*, in that both Codes fail to recognise that criminal fault, dispersed throughout a corporate body's organisational structure, can lead to offensive conduct.<sup>337</sup>

## D. Conclusions and Recommendations

8.271 As the law currently stands, corporate bodies generally have the same capacity to commit a criminal offence as a natural person.<sup>338</sup> Despite this, there is some uncertainty about the test, or tests, to be applied to determine how entities, other than natural persons, can be held to account for criminal offences. The benefit of introducing a general scheme of

<sup>335</sup> American Law Institute, *Model Penal Code Commentaries* (1985) Part 1 Sections 1.01-2.13, at 338-339.

<sup>336</sup> American Law Institute, *Ibid.* at 339.

The Institute intends that the "high managerial agent" model should be retained for more serious offences (see Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 59).

<sup>337</sup> As seen in *P&O European Ferries, Great Western Trains Company*, and the *Westray Mine* incident, discussed above.

<sup>338</sup> As a matter of common law (see *Royal Mail Steam Packet Co v Braham* (1877) 2 App Cas 381 (PC) 386) and statutory interpretation (see section 18(c) and (j) of the *Interpretation Act 2005*), corporate bodies, in general, have the same capacity to commit criminal offences as natural persons.

corporate criminal liability in Ireland would be to have a single, coherent approach for imposing liability on corporate offenders.

8.272 The Commission approves of an approach that provides for distinct models of liability attribution which are tailored to the nature of the fault element of an offence, whether it is subjective fault based, objective fault based, or a no fault offence. With regard to the fault elements, the Commission approves of a tracking principle that provides that the culpability required for secondary offending should correspond to (that is track) the culpability required for the substantive offending. This tracking principle is one that has been adopted in common law jurisdictions around the world.<sup>339</sup> This is also a principle that the Commission has endorsed in previous Reports.<sup>340</sup>

**R 8.01 The Commission recommends the enactment of a generally applicable scheme (the corporate scheme) of attributing criminal liability to corporate bodies (which would also apply to other prescribed undertakings), which would involve different approaches depending on the nature of the fault element, if any, in the specific offence in question.**

**R 8.02 The Commission recommends that this corporate scheme should provide for different models to attribute liability for the following 3 types of offences: subjective fault based offences (those that involve proof of knowledge, intention, or recklessness); objective fault based offences (those that involve proof of gross negligence, negligence, unreasonableness or comparable terms); and no fault offences (that is, strict liability offences, in which a defence of due diligence is available, and absolute liability offences, in which a defence of due diligence is not available).**

## 1. Subjective fault-based offences

8.273 The Commission is of the view that any model for attributing corporate criminal liability for subjective fault based offences must be formulated to take account of modern corporate decision-making processes. It is within the context of a realist view of the corporate decision-making that the subjective fault of a corporate defendant must be identified.

**R 8.03 The Commission recommends that the corporate scheme should include an attribution model for subjective fault based offences based on a significantly expanded and reformed model of the identification doctrine.**

8.274 The Commission is also of the view that corporate decision-making is not limited only to the higher-level of the corporate structure. As is apparent from many of the cases considered in this chapter (*Brent*, *Pioneering Concrete*, and *Meridian*), culpability for the commission of an offence can be located within the scope of a delegated decision-making

<sup>339</sup> See *Canadian Criminal Code* and the *Australian Criminal Code* discussion above.

<sup>340</sup> Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010).

power. This can be done even at the lowest point in the corporate management hierarchy (for example, consider the decision-making power delegated to the check-out point employee as to who can be sold an age 18 classified video-film in *Tesco v Brent*).<sup>341</sup>

8.275 The Commission notes that the expanded identification approach recognised by the Court of Appeal of England and Wales in *El Ajou v Dollar Land Holding plc*, and by the Canadian Supreme Court in Canadian *Dredge & Dock v R* goes some way to reflecting this realistic view:

“companies [...] must of necessity operate by the delegation and sub-delegation of authority from the corporate center; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking.”<sup>342</sup>

8.276 In recognising this expanded identification approach, the Canadian Courts recognised the concept of a delegated operational authority. That is, certain agents being granted the authority to organise and implement the corporate body’s conduct. The Commission considers that this concept of delegated operational authority provides a useful baseline calibration for the scope of corporate attributional liability.

**R 8.04 The Commission recommends that the subjective fault element of an offence, which is to be attributed to the corporate body, may be identified in a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the offence in question, and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question, but not including a natural person who has simply been given the role of carrying out such policy-related operational authority.**

8.277 The expanded identification approach is still subject to criticism for its use of the unrealistic legal fiction that the identified person is operating as the corporate body. The Commission acknowledges that corporate bodies must act through their employees or agents. The law should be formulated to accurately reflect this fact, rather than relying on a legal fiction. The Commission approves of an alternative approach for justifying the imputation of fault to the corporate body.<sup>343</sup>

**R 8.05 The Commission recommends that in order for the subjective fault of the identified employee or agent to be attributed to the corporate body, the employee or agent must have acted (whether in committing the conduct element of the offence, delegating that conduct element to another employee or agent, or acquiescing to that conduct element:**

<sup>341</sup> *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037.

<sup>342</sup> *Canadian Dredge & Dock v R* [1985] 1 SCR 662, at 693.

<sup>343</sup> This is similar to the approach adopted in the *Canadian Criminal Code*.

see recommendation 8.06 below), at least in part, “for the benefit of the corporate body” or “within the scope of his or her activity for the corporate body”.

8.278 A realistic view of corporate functioning must acknowledge that criminal conduct within a large complex corporate body may not coincide with criminal fault on the part of a single individual.<sup>344</sup>

8.279 Allowing for the imposition of liability based upon 4 distinct grounds, based on those in section 22.2 of the *Canadian Criminal Code*, and listed below in recommendation 8.06, allows for a separation of the fault and conduct elements of the offence. This caters for realistic scenarios in which criminal conduct is delegated or acquiesced to by an employee or agent in an authoritative position. These grounds overcome the shortcoming of the *Nattrass* doctrine that prevented the imposition of liability in circumstances where both the fault and conduct of an offence could not be identified in a single individual acting as the corporate body.

8.280 This approach allows liability to be imposed where an authoritative employee or agent has the requisite level of fault, even though the perpetrator of the offending conduct may not have the requisite level of fault.

8.281 The fourth liability ground goes further than the grounds provided by the *Canadian Criminal Code*. This ground is included to take account of the realistic scenario in which corporate offending does not result from the express delegation of the conduct element of an offence in circumstances where the commission of the conduct is tacitly allowed, or recklessly tolerated.

8.282 The Commission acknowledges that the 4 grounds for attributing subjective fault to a corporate body do not provide for the attribution of liability where fault is spread through-out the corporate body (such as in *R v P & O European Ferries (Dover) Ltd*, or *Western Trains Company*, or identified in the *Westray Mine* incident). However, the Commission approves of the reasoning set out by the Canadian government in formulating the *Canadian Criminal Code* model, that it is more appropriate to deal with this form of dispersed/collective fault by way of objective-fault (negligence) based offences. Further, this approach reflects the argument that the nature of subjective fault does not allow it to be dispersed, because “[t]wo (semi) innocent states of mind cannot be added together to produce a guilty state of mind.”<sup>345</sup>

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<sup>344</sup> This is something which both the *Nattrass* doctrine and the Canadian common law expanded doctrine fail to acknowledge, but which is now recognised in Canadian criminal law by the *Canadian Criminal Code*.

<sup>345</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 299. See also *Armstrong v Strain* [1952] 1 KB 232, Devlin J: “There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge, or [...] state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get, as a result, a dishonest state of mind.”

**R 8.06 The Commission recommends that the subjective fault element of an offence will be attributed to the corporate body in the following circumstances:**

- (1) where the identified employee or agent, operating within the scope of his or her authority, is party to an offence; or**
- (2) where the identified employee or agent, operating within the scope of his or her authority, delegated the conduct element of the offence to one or more other employees or agents of the corporate body; or**
- (3) where the identified employee or agent knowingly fails to take reasonable steps to prevent the conduct element of an offence being perpetrated by one or more other employees or agents of the corporate body (whether or not he or she is operating within the scope of his or her authority); or**
- (4) where the identified employee or agent, operating within the scope of his or her authority, recklessly (with a conscious disregard of risk) fails to take reasonable steps to prevent criminal conduct being perpetrated by one or more other employees or agents of the corporate body.**

8.283 The use of a rebuttable presumption in this model is justified on the basis that certain things may be peculiarly within the knowledge of a corporate defendant or its agents. In particular, an employee or agent who satisfies one of the above 4 grounds in Recommendation 8.06, and who exercised a delegated operational authority can be assumed to be within the knowledge of the corporate defendant, unless it can demonstrate the contrary. To exclude this presumption would place an unfair burden on the prosecution to prove its case, not necessarily because no agent or employee who satisfied the expanded identification doctrine provided by the scheme existed, but rather because the nature of the corporate body's organisation has made it difficult to identify any such person and that the relevant information is within the control of the organisation.<sup>346</sup>

**R 8.07 The Commission recommends that this corporate scheme should provide for a rebuttable presumption that an identified employee or agent, acting within the scope of his or her authority, is party to an offence (the first ground for liability set out in recommendation 8.06), because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.**

**R 8.08 The Commission recommends that this presumption will be raised where the prosecution has demonstrated (to the satisfaction of the evidential standard) that:**

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<sup>346</sup> Reverse evidentiary burdens and the principle of peculiar knowledge as a justification for such provisions are considered further in the discussion of the scope of persons to be subject to liability and burden shifting provisions in Chapter 9.

- (1) **the conduct element of the offence has occurred, and**
- (2) **this conduct could only have been committed in satisfaction of one of the 4 grounds outlined in recommendation 8.06, and that**
- (3) **in raising this presumption, the prosecution will not be required to identify a specific employee or agent exercising a delegated operational authority.**

**R 8.09 The Commission recommends that it should be provided that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) either that:**

- (1) **no specific employee or agent, exercising a delegated operational authority, in fact satisfied any of the 4 grounds outlined in recommendation 8.06; or**
- (2) **the corporate body had taken all reasonable steps to prevent the satisfaction of whichever of the 4 grounds is being relied upon by the prosecution.**

## **2. Objective-fault based offences**

8.284 The attribution of criminal liability for objective fault based offences is not a novel concept in Ireland. A functional and effective test for gross negligence liability was laid down by the Court of Criminal Appeal as far back as 1948 in *The People (Attorney General) v Dunleavy*.<sup>347</sup> The *Dunleavy* approach to gross negligence was considered by the Commission in the 2005 *Report on Corporate Killing*. In that Report, the Commission recommended the introduction of a statutory offence of corporate manslaughter, concluding that the elements for gross negligence outlined in *Dunleavy* were suitable to apply to an “undertaking” (a definition which includes corporate bodies) “without major alteration”.<sup>348</sup>

8.285 The Commission continues to approve of the suitability of applying these principles to corporate bodies for gross negligence based offences. However, the Commission acknowledges that criminal law also provides for offences that are based upon a number of other (much more frequently used) forms of objective fault that represent lower levels of culpability, including simple negligence. As such, the liability model set out in the 2005 Report is not, by itself, suitable for attributing all objective fault to corporate bodies.

8.286 The recommended scheme must allow liability to be imposed upon a corporate body on the basis of simple negligence and similar unreasonableness based fault elements. As the 2005 Report’s model is designed to cater for the decision-making realities of corporate

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<sup>347</sup> *The People (Attorney General) v Dunleavy* [1948] IR 95.

<sup>348</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at paragraph 2.09. Very similar criteria for imposing objective fault have been used in a general model for the attribution of corporate liability for negligence based offending in both the Canadian and Australian Criminal Codes.

bodies, it is a suitable model for use as the basis for both a model within the new scheme designed to cater for gross negligence based offences, and, with some modification, a model which caters for simple negligence based offences.

**R 8.10 The Commission recommends that the corporate scheme should provide for two separate models for attribution in objective fault based offences: one based upon the gross negligence standard, and one based upon the simple negligence standard.**

**R 8.11 The Commission recommends that the gross negligence model should involve the following elements:**

- (1) **The corporate body was negligent;**
- (2) **The corporate body's negligence was of a sufficiently high degree to be characterised as "gross" negligence, that is, it fell far below the standard of care required in the circumstances; and**
- (3) **The negligence resulted in the conduct (that is, consequence) element of the offence in question being satisfied.**

**R 8.12 The Commission recommends that the simple negligence model should involve the following elements:**

- (1) **The corporate body was negligent;**
- (2) **The negligence resulted in the conduct/consequence element of the offence in question being satisfied.**

8.287 These broad models provide significant discretion to the courts to determine fault. In the 2005 Report, the Commission also recommended that "when assessing whether an undertaking has met the standard, regard should be had to the way in which the organisation's activities are managed or organised by high managerial agents".<sup>349</sup> This view prompted the Commission to include a non-exhaustive list of "corporate culture" factors within the draft Bill attached to the Report. These included, for example, factors such as internal governance systems, as well as the role of "high-managerial agents".

8.288 These factors will have to be altered in such a way as to satisfy the generally applicable nature of this liability model. Such an approach would encourage a realistic assessment of the "organisational fault" of the corporate body.

**R 8.13 The Commission recommends that, in both objective fault models (gross negligence and simple negligence), when assessing whether a corporate body has breached the standard of care, regard should be had to the way in which the organisation's activities are managed or organised by high managerial agents. This should be done by reference**

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<sup>349</sup> Law Reform Commission, *Report on Corporate Killing*, (LRC 77-2005) at paragraph 2.38.

**to a non-exhaustive list of “corporate culture” factors, such as internal governance and communications systems, the role of “high-managerial agents”, compliance (or otherwise) with relevant statutory requirements, and compliance (or otherwise) with relevant statutory codes or guidance from regulators.**

8.289 The Commission also acknowledges that the scope of objective fault elements that appear within the criminal law goes beyond both gross and simple negligence. The law caters for a wide variety of offences that allow liability to be imposed based upon different formulations of unreasonableness on the part of a defendant.<sup>350</sup> As such, the recommended scheme must also cater for this diverse range of objective fault elements.

**R 8.14 The Commission recommends that the corporate scheme should provide that objective fault based offences that do not use either gross negligence or simple negligence as the fault element should, so far as possible, track onto the most suitable of the two recommended objective fault attribution models.**

**R 8.15 The Commission recommends that in the case of offences in which the level of culpability of the fault element is lower than or equal to that of simple negligence, the simple negligence model will apply, and that in the case of offences in which the level of culpability required of the fault element is greater than that of simple negligence, the gross negligence model will apply.**

### **3. No-fault based offences**

8.290 Strict and absolute liability offences allow criminal liability to be imposed directly based solely on a person having voluntarily carried out certain criminal conduct or having brought about a specific criminal result. This direct form of liability applies to a corporate body defendant in the same manner as it applies to a natural person. However, for the avoidance of doubt, the Commission is of the view that this should be confirmed by the recommended scheme of corporate criminal liability attribution.

8.291 These types of offences do not require the prosecuting entity to prove any fault, subjective or objective, as a pre-requisite to imposing criminal liability upon a defendant. The distinction between strict and absolute liability is that strict liability offences will include a defence that will allow a defendant to demonstrate his or her lack of culpability in order to avoid liability. Absolute liability offences will not provide any such offence.

8.292 It must be noted, however, that the nature of the defence, which may be provided for in any given strict liability offence, may change. Certain strict liability offences may provide for a defence that allows the defendant unqualified opportunity to satisfy the court that

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<sup>350</sup> For example, “without reasonable excuse” and “so far as is reasonably practicable” based offences.



they had acted objectively reasonably,<sup>351</sup> while other strict liability offences will only provide a defence where the defendant can demonstrate that he or she had taken defined steps.<sup>352</sup>

8.293 The Commission is of the view that the conduct required in order to satisfy an objective based defence can be attributed to the corporate body in the same way that the Commission has recommended the conduct element of an offence will be attributed to the corporate body.

8.294 In relation to absolute liability offences, as all that is required in a prosecution of such an offence is proof of some specific conduct on the part of a defendant, the attribution of conduct recommendations below will also cater for this form of offence.

**R 8.16 The Commission recommends that the corporate scheme should provide that strict and absolute liability offences involve the imposition of direct, personal, criminal liability to a corporate body defendant.**

**R 8.17 The Commission recommends that the corporate scheme should provide that the conduct element of both strict and absolute liability offences will be attributed to the corporate body using the attribution of conduct elements in recommendations 8.19-8.23 below).**

**R 8.18 The Commission recommends that where the defence to a strict liability offence requires proof of certain steps or conduct on the part of the corporate body, these steps can be attributed in the same manner as set out in recommendation 8.20 below.**

#### **4. Attribution of the conduct element of an offence to the corporate body**

8.295 The nature of the corporate body as an incorporeal legal person means that any conduct on the part of the body (barring omissions) must be performed on its behalf by an agent. In relation to conduct elements that include positive criminal acts, or positive conduct that leads to a criminal result, the corporate body cannot perform the criminal act directly without acting through an agent. Though employees and agents of a corporate body, while performing their functions, will be acting under the influence or instruction of the corporate body, they will also (in the vast majority of cases) be acting freely and voluntarily. As such, any criminal act performed by a corporate agent on the body's behalf

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<sup>351</sup> Section 55(1)(y) of the *Consumer Protection Act 2007* provides a defence to a strict liability offence, if the defendant proves that it "exercised due diligence and took all reasonable precautions to avoid commission of the offence."

<sup>352</sup> Section 31 of the *Intoxicating Liquor Act 1988*, as amended by section 14(1)(b) of the *Intoxicating Liquor Act 2000*, provides a defence to the strict liability offence of selling, or permitting the sale, of intoxicating liquor to a person under the age of 18. The defence requires the defendant to prove that he or she required the production of an age card demonstrating that the person served was over the age of 18. The 2000 amendment had the effect of limiting this defence, which had previously allowed the defendant to avoid liability by demonstrating that he or she believed that the person served was over the age of 18.

will necessarily be performed by a separate natural person acting autonomously. Any such criminal act will (generally) be brought about by a “free, deliberate and informed human intervention”.<sup>353</sup>

8.296 As such, the reality of the means by which the corporate body conducts itself is not compatible with the traditional principles of criminal conduct attribution or causation, which were developed with natural persons in mind.

8.297 To date, the courts have not demonstrated a significant difficulty in attributing the conduct performed by corporate agents to the corporate body. The courts have achieved this by adopting a flexible approach to attribution of criminal conduct and criminal causation. The framers of some of the corporate liability models used in other jurisdictions, and considered above, have chosen not to expressly provide for a mechanism of conduct attribution. In so doing, these framers sought to rely on the existing principles of conduct attribution and causation. In relation to the recommended scheme of corporate liability attribution, the Commission does not approve of this approach. Relying upon discretionary application of the already uncertain principles of criminal conduct attribution and causation to impose criminal liability will generate uncertainty and undermines the legality principle. This scheme is intended to cater for the criminality of both SMEs and large corporate bodies. Maintaining such vagueness and discretion in the criminal law would leave open an avenue of attack for richer corporate entities, which less well-resourced entities would have less access to attacking.

**R 8.19 The Commission recommends that the corporate scheme should provide for a model for attributing positive criminal conduct to the corporate body and that this should provide for the attribution of positive conduct, which of itself satisfies the conduct element of an offence (in an act based offence), or which causatively results in the satisfaction of the conduct element of an offence (in a result based offence).**

8.298 Because of its incorporeal nature, the corporate body must act through its natural person agents. The Commission recommends that there should be enacted a model providing for corporate criminal acts, or corporate conduct that causes a criminal result, to be derived from the conduct of one or a collection of the body’s agents acting in the course of their business for the body, and/or for the benefit of the corporate body.

**R 8.20 The Commission recommends that the corporate scheme for conduct attribution should provide that the corporate body may have attributed to it the positive criminal acts, or positive conduct which causes a criminal result, of one or more of the corporate body’s employees or agents who are:**

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<sup>353</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine 6th ed* (Hart 2016) at 96-104.

- (1) acting in the course of their ordinary or reasonably understood business for the body;**
- (2) directed, expressly or implicitly, by another employee or agent who is exercising a delegated operational authority; or**
- (3) acting for the benefit of the corporate body.**

8.299 As noted in the subjective fault attribution recommendations above, criminal conduct within a large complex corporate body may not coincide with criminal fault within a single individual. The subjective fault attribution recommendations recognise a number of realistic scenarios where the conduct element of an offence may be:

- delegated to another employee or agent of the corporate body;
- knowingly acquiesced to; or
- recklessly acquiesced to.

8.300 It is foreseeable that a scenario could arise where the conduct element of an offence is delegated or acquiesced to, and perpetrated by one or more agents of the corporate body. It is foreseeable that the size and complex organisational structure of certain corporate entities may act to conceal the identity of the agent/s who perpetrated the conduct element on the corporate body's behalf. As noted above, the principle of peculiar knowledge acknowledges that such a state of affairs may place an unfair burden on the prosecutor to prove the conduct element of an offence.<sup>354</sup>

8.301 The Commission is of the view that such an evidential disadvantage does not serve justice. In such a scenario, it is not the case that agents, acting on behalf of the corporate body, did not perpetrate the conduct element of the offence. Rather, the nature of the defendant and the circumstances of the offending are such as to block the prosecuting entity's access to evidence supporting its case.

**R 8.21 The Commission recommends that the corporate scheme for conduct attribution should include a rebuttable presumption that the conduct element of the offence has been satisfied, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.**

**The presumption will be raised once the prosecution has demonstrated (to the satisfaction of the evidential standard) that:**

- (1) the positive criminal act or criminal result, which amounts to the conduct element of the offence in question, has occurred; and**

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<sup>354</sup> The concept of peculiar knowledge is considered further in Chapter 9.

- (2) the nature of that act or result is such that the conduct in question was committed by one or more employees or agents of the corporate body (in the case of a criminal act), or it was caused by the conduct of one or more employees or agents of the corporate body (in the case of a criminal result).**

**In raising this presumption, the prosecution will not be required to identify the specific employee/s or agent/s who perpetrated the conduct in question.**

**R 8.22 The Commission recommends that it should be provided that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) that:**

- (1) the positive criminal act or conduct which caused a criminal result, which amounts to conduct element of the offence in question, was not committed by an employee or agent of the corporate body; or**
- (2) the corporate body had taken all reasonable steps to prevent commission of the conduct in question.**

8.302 The Commission acknowledges that the potential difficulties regarding the existing principles of positive conduct attribution do not apply in the same way where the conduct element of an offence is an omission, or a criminal result caused by an omission. Attributing a failure to do something or to achieve some result to a corporate body can be done directly – there is no need to attribute the omission to the corporate body from one of its natural person agents. The lack of difficulty in attributing an omission to a corporate body has been demonstrated repeatedly before the courts, which have frequently attributed conduct by way of an omission to a corporate body without difficulty.<sup>355</sup> For this reason, the Commission is of the view that the new scheme does not need to make specific provision for the attribution of omissions.

**R 8.23 The Commission recommends that conduct by way of an omission be attributed to the corporate body in the same way as it is to a natural person.**

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<sup>355</sup> *The People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338; *The People (DPP) v Oran Pre-Cast Ltd* Court of Criminal Appeal 16 December 2003.

## CHAPTER 9

# LIABILITY OF CORPORATE MANAGERIAL AGENTS

## A. Introduction

9.01 Chapter 8 discussed the test for attributing criminal liability to the corporate body. It recommended a combined approach that includes organisational elements and reference to decision-making by senior managers and comparable agents. In this Chapter, the Commission considers a second, related, issue: how personal liability should be attributed to senior managers and comparable agents of the corporate body where this is contingent on, or derived from, their involvement in an offence committed by the corporate body. For example, if a corporate body has committed a fraud offence or an offence under competition law, in what circumstances can a senior manager or comparable agent be held personally liable. This is separate from the issue of the primary liability of a manager or comparable corporate agent, or any other person, where he or she commits an offence independently of the corporate body. A third related area, the scope of a defence of due diligence, is considered in Chapter 10, below.

9.02 It is clear that personal sanctions act as a deterrent for persons in corporate bodies who might contemplate or disregard a known risk of acting illegally or causing the corporate body to act illegally.<sup>1</sup> Applying sanctions to corporate offenders without providing a means for sanctioning individual managers and officers who can be proved to have contributed to the offending can undermine this deterrent effect.<sup>2</sup>

“The danger in the practice of prosecuting corporations is that they offer too obvious and easy a target’. Unless individuals are also

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<sup>1</sup> See Foster, “Individual Liability of Company Officers” in Gobert and Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) at 116, citing Horrigan, Director of the National Centre for Corporate Law and Policy Research at the University of Canberra, who suggested that the foundational, primary concerns for directors are the issues of “personal sanctions and liabilities.”

<sup>2</sup> See Wright, “Criminal liability of directors and senior managers for deaths at work” [2007] Crim LR 949, at 950; see also Glazebrook, “A Better Way of Convicting Businesses of Avoidable Deaths and Injuries” (2002) 61 CLJ 405, citing Williams, *Criminal Law: the General Part* 2nd ed (Stevens 1963), in support of the argument that unless individuals are also prosecuted, “the punishment of corporations is of small relevance to the purposes of the criminal law”; and Wells, “Corporations: Culture, Risk and Criminal Liability” [1993] Crim LR 551, at 565; Wells, “The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity” [1996] Crim LR 545, at 553; and Wells, *Corporations and Criminal Responsibility* (OUP 2001).

proceeded against, ‘the punishment of corporations is of small relevance to the purposes of the criminal law’.<sup>3</sup>

- 9.03 Attaching criminal liability to human persons for wrongful acts committed by the corporate body is generally aimed at persons playing a significant role within the corporate body and this is reflected in existing statutory provisions relating to such attribution of liability. The Commission has previously noted that the decisions of the company are deeply intertwined with the individual decisions, acts and omissions of its constituent human members,<sup>4</sup> and this is also reflected in the combined model of attribution of corporate criminal liability recommended in Chapter 9, above.
- 9.04 It is now recognised that the role of senior individuals in the decision-making of corporate bodies requires a high standard of behaviour, in particular by a duty of active participation.<sup>5</sup> As noted in Chapter 9, this is also reflected in the statutory codes of conduct published by many regulators, which in turn reflects the reality of corporate governance requirements and practices in many modern corporate bodies.
- 9.05 This approach was also endorsed by the Supreme Court in *The People (DPP) v Hegarty*,<sup>6</sup> where the Court made clear that the rationale behind the statutory provision in the *Competition Acts* was to attach liability to a manager or officer of an undertaking that has committed certain offences. The Court pointed out that because human beings are directly instrumental in the actions of a corporate body, it is necessary to create offences against certain influential position holders within a company; namely, “those without whose involvement the offending conduct could not be endorsed or approved”. The Court added that, without such a provision, the regulatory purpose behind such legislation would be greatly diminished.

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<sup>3</sup> Glazebrook, “A Better Way of Convicting Businesses of Avoidable Deaths and Injuries” [2002] CLJ 405, at 415, citing Williams, *Criminal Law: the General Part* 2nd ed (Stevens 1963). Matthew Elderfield, (then Head of Financial Regulation and Deputy Governor of the Central Bank), in his final appearance before the Oireachtas Public Accounts Committee (PAC) noted that the existing regulatory and criminal enforcement system had been inefficient at ensuring that individuals had been held to account: *Oireachtas Committee of Public Accounts Debate*, Vol. 2 No. 70,

<sup>4</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005) at 41.

<sup>5</sup> Ahern, *Directors’ Duties* (Thomson Reuters 2011) at 128.

<sup>6</sup> *The People (DPP) v Hegarty* [2011] IESC 32.

9.06 In recent years, this logic has been the driving force behind an increase in the severity and emphasis on the use of individual or personal sanctions in economic regulatory regimes both domestically,<sup>7</sup> and at EU level.<sup>8</sup>

9.07 Submissions made to the Commission's *Issues Paper on Regulatory Enforcement and Corporate Offences*<sup>9</sup> support the introduction of a provision to address the derivative liability of individual corporate officers. The submissions provide a consensus view that whatever formulation such provisions take they should not impose an unduly onerous evidential burden on the prosecutor, such as to render a successful prosecution impossible or improbable. The submissions do not provide a consensus as to which specific model of individual derivative liability should be followed. Against that background, the Commission now turns to consider the most suitable proposal.

## B. Secondary Participation in a Corporate Context

9.08 The conduct of any number of parties, other than the perpetrator of the conduct element of the offence, can facilitate the commission of a crime. This is why the criminal law provides for derivative criminal liability for secondary participants in a crime.<sup>10</sup> Criminal sanctions would be under-inclusive if they did not provide a means to hold an individual who has encouraged or assisted in the substantive offending of another person criminally liable.<sup>11</sup>

9.09 The ability to impose secondary criminal liability based upon a person's morally blameworthy interaction with the substantive offending of another party has long been recognised by the criminal law through the doctrine of secondary participation.<sup>12</sup>

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<sup>7</sup> Sections 33AQ(4) and 33AS(1) and (2) of the *Central Bank Act 1942*, as amended by the *Central Bank (Supervision and Enforcement) Act 2013* has resulted in an increase in the maximum civil financial sanctions to €1 million for individuals under the Central Bank's Administrative Sanctions Procedure. The regulatory models pursued by the Central Bank places an emphasis on pursuing individual accountability - Central Bank of Ireland, Introduction to Enforcement, available at <https://www.centralbank.ie/regulation/how-we-regulate/enforcement>.

<sup>8</sup> Such as under the *European Union Capital Requirements Directive (2013/36/EU)*.

<sup>9</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8-2016).

<sup>10</sup> See McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at ch 10. See also Ashworth, *Principles of Criminal Law* 5th ed (OUP 2006) at ch 10, for a discussion of participation in criminal offending generally.

<sup>11</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 454; see also Ashworth, *Principles of Criminal Law* 5th ed (OUP 2006) at 411.

<sup>12</sup> Prior to 1997, some statutory schemes of secondary or derivative liability in a specific corporate setting were in place, such as section 383 of the *Companies Act 1963*, discussed below, and section 48(19) of the *Safety, Health and Welfare at Work Act 1989* (since replaced by section 80 of the *Safety, Health and Welfare at Work Act 2005*). The more general scheme of secondary derivative criminal liability was in section 8 of the *Accessories and Abettors Act 1861*, which provided for the secondary criminal liability of a person who intentionally (the fault element of the doctrine of secondary liability) aided, abetted, counselled or procured the commission of the substantive offence (the conduct element of the doctrine of

9.10 Where a person contributes to, or facilitates, the perpetration of the substantive offence by another, and this is accompanied by some culpability on his or her part, this person (the secondary participant) can be as deserving of criminal sanction as the perpetrator of the offence (the principal offender),<sup>13</sup> if not more deserving.<sup>14</sup>

9.11 The doctrine of secondary participation provides for a sharing of the culpability that flows from the commission of the offence. The secondary participant, despite not having committed the conduct element of the offence, derives secondary liability from his or her role in contributing to or facilitating the offence:

“[...] it has always been implied in the concept of [secondary participation] that [a secondary participant’s] involvement [...] did make some difference to the outcome, and, as a consequence of this, [secondary participants] have been implicitly linked to the harm element in the principal offence. [...] In sum then [...] the [secondary participant’s] liability is derivative or parasitic of a principal offence and its harm content. Rather than relying solely on the [secondary participant’s] mental culpability, unlike inchoate liability, complicity responsibility also implicitly draws on the attributable harm of the principal offence.”<sup>15</sup>

9.12 Importantly, it must be noted that this species of derivative liability does not require that the secondary participant’s conduct *caused* the commission of the substantive offence. However, it will require proof that the substantive offence has been committed (due to its derivative nature), and it generally requires proof of an act or omission that contributed to or facilitated the substantive offence.<sup>16</sup>

9.13 The doctrine of secondary liability does not provide for derivative liability in all circumstances where the conduct element of an offence is committed by another party.

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secondary liability). The 1861 Act was repealed and replaced by the *Criminal Law Act 1997*, section 7 of which provides for the current general scheme of secondary/derivative criminal liability in Ireland: “Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.”

<sup>13</sup> See McIntyre et al, *Criminal Law* (Round Hall 2012) chapter 13 for a discussion of degrees of complicity in crime in general. See also Williams, “Finis for Novus Actus?” (1989) 48 CLJ 391.

<sup>14</sup> Williams, *Textbook of Criminal Law* (Stevens & Sons 1978) at 287, in making this point, notes that “Lady Macbeth was worse than Macbeth”.

<sup>15</sup> Smith, “The Law Commission Consultation Paper on Complicity: (1) A Blueprint for Rationalism” [1994] Crim L Rev 239, at 244. Smith refers to the doctrine of secondary participation as “complicity”, and refers to the secondary participant as the “accessory”.

<sup>16</sup> The secondary participant’s conduct in aiding, abetting or counselling the commission does not require a causative link to the substantive offence in a strict “but for” fashion. However, Smith, *A Modern Treatise on the Law of Criminal Complicity* (OUP 1991) at 19, suggests that: “It has always been implied in the concept of complicity that [the secondary participant’s] involvement ... did make some difference to the outcome and as a consequence of this, accessories have been implicitly linked to the harm element in the principal offence”. Further, the act of “procuring” the commission of an offence is treated somewhat differently in case law, as requiring that proof of causation: see *Attorney General’s Reference (No.1 of 1975)* [1975] QB 773, at 779.



The limits of this can be seen by comparing secondary liability to the doctrine of innocent agency,<sup>17</sup> the inchoate offence of conspiracy,<sup>18</sup> or joint enterprise liability.<sup>19</sup>

## 1. Principal offenders from whom liability can be derived

- 9.14 It must be acknowledged that, like incorporated entities, unincorporated bodies of persons can also be controlled and influenced by a management structure made up of natural persons, can harm society through their conduct, and can, in the case of many criminal offences, be held criminally liable. Section 18(c) of the *Interpretation Act 2005* includes “unincorporated body of persons” in the definition of “person”. As a result, unincorporated bodies of persons can be held liable for statutory offences that apply to persons. In addition, certain pieces of legislation expressly provide that unincorporated bodies can be subject to criminal liability, for example the *Competition Act 2002* and the *Safety, Health and Welfare at Work Act 2005*.
- 9.15 Throughout this chapter the principal offender from whom the liability of an agent is to be derived will be referred to as the “corporate body”. However, as noted in Chapter 8,<sup>20</sup> the Commission recognises that (in the context of implementing the recommendations in the Report) it may be necessary to consider the criminal liability of other collective undertakings. For example it may be necessary to consider the criminal liability of partnerships, which do not, under current Irish law, have a separate legal personality. The Commission is conscious in this respect that a number of existing statutory schemes that provide for corporate criminal liability also include express provision for the criminal liability of unincorporated bodies such as partnerships. This has been achieved by imposing duties giving rise to criminal liability on an “undertaking”, defined to include a corporate body and an unincorporated body.<sup>21</sup> The Commission also adopted this approach in its 2005 *Report on Corporate Killing*.<sup>22</sup> For this reason, while the Commission

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<sup>17</sup> The doctrine of innocent agency allows for a person who causes the conduct element of an offence to be perpetrated by an innocent agent (such as a person who lacks the capacity to commit a crime, or does not demonstrate the requisite fault element for the crime in question) to be held liable as a principal offender, rather than a secondary participant.

<sup>18</sup> The inchoate offence of conspiracy is provided for by both statute (section 71 of the *Criminal Justice Act 2006* provides for a statutory offence which applies to “serious offences” being those for which a person may be imprisoned for a period of 4 or more years) and common law (for the remainder of offences). Conspiracy allows for liability to be imposed on a person who conspires with one or more persons to do an act that constitutes a serious offence (in the case of the statutory offence) or to do an unlawful act, or to do a lawful act by unlawful means (in the case of the common law offence). Conspiracy criminalises the agreement between persons to do a wrong. The completion of the substantive wrong by another, or the fact that it is not completed, is not relevant to the offence of conspiracy. Persons convicted of conspiracy are liable to be punished as a principal offender.

<sup>19</sup> Joint-enterprise liability allows for two or more persons to be liable as joint-principal offenders for offences committed in furtherance of an agreed criminal enterprise.

<sup>20</sup> Chapter 8, fn5.

<sup>21</sup> See for example the definitions of “undertaking” in section 3 of the *Competition Act 2002* and section 2 of the *Safety, Health and Welfare at Work Act 2005*.

<sup>22</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77-2005).

refers to “corporate body” in this Chapter, this should not be taken to exclude the application of the recommendations to other undertakings.

## 2. Culpability of agent

9.16 Generally, the criminal law will not seek to impose liability on a person who is not personally at fault for some criminal conduct or result. The five models considered in this Chapter for imposing liability on corporate agents for their culpable contribution to, or facilitation of corporate offending, generally abide by this rule.

9.17 The fault required by the criminal law in order to impose liability will not be the same for every crime. As already noted in Chapter 8, over time, the criminal law has developed different levels of culpability that an offence may require of a person in order for that person to accrue liability.<sup>23</sup> These levels of culpability can be broken into three types:

- (1) Subjective fault – the culpability of the defendant will be determined based upon the subjective knowledge, beliefs or intentions of the defendant. How the defendant has behaved in comparison to objective, community, standards is not relevant.
- (2) Objective fault – the culpability of the defendant is determined based upon that defendant’s behaviour as judged against an expected or required standard of behaviour. The subjective knowledge, beliefs or intentions of the defendant are not relevant.
- (3) No fault (strict liability offences and absolute liability offences) - public policy provides for certain offences that allow liability to be imposed based only upon the voluntary commission of criminal conduct, without requiring proof of criminal fault.

9.18 Objective fault is necessarily a less personal form of culpability than subjective fault, as it does not require the conscious wrongdoing of the defendant. It is generally less arduous to prove than subjective fault. As such, objective fault is a lower level of culpability than subjective fault.<sup>24</sup> Offences that do not require any proof of any fault are still more remote from the personal culpability of a defendant, and even less arduous to prove, and so require the lowest level of culpability.

9.19 Even within these three types of culpability, the criminal law has recognised different levels of culpability. The criminal law recognises six different main categories of criminal

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<sup>23</sup> For a discussion of the history and development of the criminal fault, see McAuley & McCutcheon, *Criminal Liability* (Round Hall 2000) at ch 6.

<sup>24</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 113.

fault that can be identified in Irish criminal law. In descending order of moral culpability, these categories are:

- (1) Subjective fault –
  - a. intention/knowledge;
  - b. subjective recklessness/wilful blindness;
- (2) Objective fault –
  - a. gross negligence;
  - b. simple negligence/constructive knowledge;
- (3) No fault -
  - a. strict liability;
  - b. absolute liability.

9.20 As was the case in Chapter 8 in the context of corporate criminal liability, it is important to examine each of these levels of culpability in the context of the personal liability of senior managers and comparable agents of a corporate body.

#### **(a) Intention and Knowledge**

9.21 As can be seen from the above hierarchy, intention and knowledge are the most culpable states of mind in Irish criminal law and are equivalent in terms of their gravity.<sup>25</sup> If a person commits a wrongful act intentionally or knowingly, this is more morally blameworthy than if that person commits the same act merely recklessly, by falling below the standards of care reasonably expected of that person, or accidentally.

##### *(i) Intention*

9.22 The definition of intention is reasonably clear:

“a person intends particular results when they are his conscious aim, object or purpose; where he has ‘sought to bring them about, by making it the purpose of his acts that they should occur’.”<sup>26</sup>

9.23 McIntyre *et al* go on to further define the borders of the concept of intention by contrasting it with other concepts.<sup>27</sup> An intended result will not necessarily be a desired

<sup>25</sup> Charleton *et al*, *Criminal Law* (Butterworths 1999) at 44.

<sup>26</sup> McIntyre *et al*, *Criminal Law* (Round Hall 2012) at 52, quoting the Law Commission of England and Wales, *Legislating the Criminal Code: Offences Against the Person and General Principles* (No. 218,1993) at paragraph 7.5.

<sup>27</sup> For a more detailed analysis of intention, see McIntyre *et al*, *Criminal Law* (Round Hall 2012) at 53-61.

result, nor even the most likely result of a person's conduct. While pre-meditation of an act or result may imply the intention of a person, the intention may also be "spontaneous or even an instinctive reaction".<sup>28</sup> The desire, likelihood, reason (or lack thereof), or pre-planning of an offence may provide inference as to the intentions of a person. However, these are not elements of that intention. These factors may be indicative, but are detached from the question as to whether he or she intended that conduct or result.

9.24 The foregoing discussion has addressed what is known as "direct intention". This applies in scenarios where a person goes about their conduct with the purpose of bringing about a wrong.<sup>29</sup> The law has also addressed the concept of oblique intention. This type of intention covers circumstances in which a person may foresee a likelihood that his or her conduct will cause a certain result, but such a result is not the "aim, object or purpose" of such conduct. This form of intention was recognised by the Special Criminal Court in *The People (DPP) v Douglas and Hayes*,<sup>30</sup> where the Court noted that the "natural consequences" of the defendants' actions must have been apparent to them and they continued with those actions with reckless disregard as to the risk of those consequences. The Court found that foresight of a likely result that subsequently came to fruition amounted to intending that result.<sup>31</sup>

9.25 The Special Criminal Court's view was not accepted by the Court of Criminal Appeal, however. The Court of Criminal Appeal found that the fact that it is foreseeable that the "natural and probable consequences" of a person's conduct may lead to a criminal result, and that the accused continued with that conduct reckless as to that possible result, may be evidence of intent. However, the court will still be required to determine whether there is sufficient evidence to find direct intention. They found that a "reckless disregard of the likely outcome of the acts performed is not itself proof of intent".<sup>32</sup>

9.26 It is arguable that to equate a person's reckless disregard of the high risk of a criminal result to intending that result is to equate intention with recklessness, a lower level of fault on the culpability hierarchy. However, there is a counter argument as to why oblique intention may be recognised in Irish criminal law. Charleton J, in *Clifford v DPP*<sup>33</sup> provided an *obiter* view that all intention be inferred from the behaviour of the accused person. The closer that conduct comes to inevitably causing the criminal result, the more readily the court will infer that the result was intended. The more removed the conduct is from the result, the less likely the court will be willing to infer intention from that conduct. In no

<sup>28</sup>McIntyre et al, *Criminal Law* (Round Hall 2012) at 54.

<sup>29</sup> Discussed *obiter* by Charleton J in *Clifford v DPP* [2008] IEHC 322, at paragraph 10.

<sup>30</sup> *The People (DPP) v Douglas and Hayes* [1985] ILRM 25.

<sup>31</sup> *Ibid.* at 26, the Court stated that "It is not necessary to constitute the intent to kill that that should be the desired outcome of what was done. It is sufficient if it is a likely outcome and that the act is done with reckless disregard of that outcome."

<sup>32</sup> *The People (DPP) v Douglas and Hayes* [1985] ILRM 25, at 26.

<sup>33</sup> *Clifford v DPP* [2008] IEHC 322, at paragraphs 10 to 12.

instance will intention in relation to an act or result be automatically inferred from a particular behaviour.

9.27 While Charleton J’s finding in relation to oblique intention is not of binding authority, it leaves open the question as to whether the Courts will allow intention to be inferred from conduct where a criminal act or result was “highly likely”,<sup>34</sup> rather than only where the act or result was the “aim, object or purpose” of the persons conduct.<sup>35</sup> If oblique intention, as described by Charleton J in *Clifford*, is recognised by the Irish courts it would expand the definition of “intention” as follows: a person intends particular outcomes when either (a) they are his or her conscious aim, object or purpose (where he or she has sought to bring them about, by making it the purpose of his or her acts that they should occur); or (b) where he or she is aware that it is highly likely that the particular outcomes may result from his or her acts, and proceeds with those acts in any case.

9.28 The definition of intention is expanded further by Irish criminal law’s recognition of a rebuttable evidential presumption that a person intends the natural and probable consequences of his or her actions.<sup>36</sup>

(ii) *Knowledge*

9.29 The fault element of knowledge may be more fully described as the knowledge “that some circumstance exists”.<sup>37</sup> Knowledge sits alongside intention as the most morally culpable criminal mental state. While intention is most commonly used in offences in which the criminal conduct is a result (such as the intention to kill in murder), knowledge is usually used as the mental element in offences in which the conduct element is a circumstance (such as a person knowingly permitting the cultivation of certain drugs on land in their control).<sup>38</sup>

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<sup>34</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 59, suggest that the *Clifford* case indicates that the Irish law may define “intention” even more broadly than the English and Welsh law. “It does not appear that ‘virtual certainty’ [the test for oblique intention in England and Wales] is the test, but intention can be inferred if the result was ‘highly likely’ to occur.”

<sup>35</sup> Charleton J’s decision was appealed to the Supreme Court: *Clifford v DPP* [2013] IESC 43, [2013] 2 IR 396, but the Court did not engage in any analysis of oblique intention.

<sup>36</sup> This presumption is provided by the common law in relation to all offences, but has been placed on a statutory footing in relation to the offence of murder by section 4(2) of the *Criminal Justice Act 1964*. This presumption places an evidential burden on the accused to demonstrate that he or she did not intend the criminal conduct or result in question. The burden of proof remains on the prosecution, who must satisfy the arbiter of fact, beyond a reasonable doubt, that the presumption has not been rebutted: *the People (DPP) v McBride* [1996] 1 IR 312

<sup>37</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Bloomsbury 2016) at 157.

<sup>38</sup> Pursuant to section 19(1) of the *Misuse of Drugs Act 1977*.

9.30 Charleton *et al* define the criminal mental state of knowledge as:

“that state of mind which is beyond believing in some state of affairs, or taking a risk that a state of affairs is as it may be thought to be. Knowledge is a state of mind which is not just rash or casual or incautious, but a state of mind whereby the mind of the accused has embraced as fact that state of affairs of which the prosecution accuse him.”<sup>39</sup>

9.31 In the English criminal law, knowledge has been similarly defined as “satisfied by proof of true belief.” This definition of knowledge requires that a person’s belief actually be correct.<sup>40</sup> This understanding of the mental state of knowledge can be identified throughout the common law world. The Canadian Supreme Court has explained knowledge as:

“In the Western legal tradition, knowledge is defined as true belief: ‘The word “know” refers exclusively to true knowledge; we are not said to “know” something that is not so.’”<sup>41</sup>

9.32 This understanding of knowledge raises the question as to whether it is possible to know a future event. In *R v Saik*,<sup>42</sup> the UK House of Lords held that “generally, references to ‘knowingly’ or the like in substantive offences are references to a past state of affairs,” which requires that the fact or circumstance in question has occurred. However, this narrow interpretation of knowledge has been questioned. Simester *et al*, suggest that knowledge (a “true belief”) can be satisfied where a person “accepts, or assumes, and has no serious doubt, at the time he acts, that the circumstance is present.”<sup>43</sup> This understanding of knowledge does allow a person to know certain “future facts”, such as the “fact” that the sun will rise tomorrow. Knowing certain “future facts” does not present a legal difficulty so long as the person “holds a settled belief, with no substantial doubt, that the fact exists or, in the case of future facts, will exist.”<sup>44</sup> This appears to be a preferable view, for the following reasons.

9.33 In a similar fashion to the courts’ willingness to infer oblique intention where a person is aware of a likely outcome to his or her conduct, there are circumstances in which the courts will be willing to infer actual knowledge from a person’s deliberate failure to inform

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<sup>39</sup> Charleton *et al*, *Criminal Law* (Butterworths 1999) at 44, base this definition on the discussion of the Supreme Court in *Hanlon v Fleming* [1981] IR 489.

<sup>40</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 142.

<sup>41</sup> *USA v Dynar* [1997] 2 SCR 462.

<sup>42</sup> *R v Saik* [2006] UKHL 18, at paragraph 20.

<sup>43</sup> Simester *et al*, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Bloomsbury 2016) at 157.

<sup>44</sup> Simester *et al*, *Ibid.* at 239.

his or herself of a circumstance.<sup>45</sup> An example is where the person had an “overwhelmingly strong belief [...] that the prohibited circumstance exists.”<sup>46</sup> This recognition of something like oblique knowledge supports Simester *et al*’s understanding of knowledge. The 2010 *Draft Criminal Code* of the Criminal Law Codification Advisory Committee also incorporates this understanding of knowledge,<sup>47</sup> which the commentary on the Code notes is “characterised by an awareness that a particular result will almost certainly follow.”<sup>48</sup>

9.34 Knowledge is not the only fault element that uses a mental state based upon subjective awareness or an understanding of fact on the part of a person. Terms such as belief<sup>49</sup> and recklessness (which will be discussed further below) are also criminal fault elements that are based upon a person’s subjective awareness or understanding of fact, but which do not coincide with knowledge.<sup>50</sup>

### **(b) Subjective Recklessness and Wilful Blindness**

9.35 Recklessness is a lower level of culpability than intention. This mental state occurs where the result in question is not the “aim, object or purpose” of the person’s conduct, but the person is aware of an unjustified risk of that result occurring and proceeds with their conduct regardless. An unjustified risk has been defined as one “without good cause, having regard to the gravity of the risk and the social utility of the activity involved.”<sup>51</sup>

9.36 Importantly, the criminal mental state of recklessness in this jurisdiction is defined by a person’s subjective awareness and disregard of a risk. In circumstances in which a person unreasonably runs a risk of a criminal result that comes to fruition, but the person was not aware of that risk, that person will not be reckless. If it is found that the person ought to have been aware of that risk, that person may be negligent (which will be considered below). However, the Supreme Court has made clear that without a subjective disregard of risk, the test for recklessness will not be satisfied.<sup>52</sup> It is the subjective awareness and

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<sup>45</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 145, make the unqualified statement that the blameworthiness involved in choosing not to make inquiry “justifies treating [this] state of mind as akin to actual knowledge”. This statement is supported by case-law of the courts of England and Wales, such as in *Taylor’s Central Garage (Exeter) Ltd v Roper* [1951] 2 TLR 284. An example of such an inference being drawn can be seen in *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155.

<sup>46</sup> Ashworth, *Principles of Criminal Law* 5th ed (OUP 2006) at 191.

<sup>47</sup> Head 1108 of the Draft Criminal Code defines “knowingly”.

<sup>48</sup> Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (TSO 2010) at 84.

<sup>49</sup> This forms part of the mental element in the offence of withholding information under section 19 of the *Criminal Justice Act 2011*.

<sup>50</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 142; Simester *et al*, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Bloomsbury 2016) at 157 suggest that a “belief [...] that something may obtain” would be sufficient for recklessness but not to satisfy knowledge.

<sup>51</sup> McIntyre *et al*, *Criminal Law* (Round Hall 2012) at 61.

<sup>52</sup> *The People (DPP) v Murray* [1977] IR 360; *The People (DPP) v Cagney and McGrath* [2008] 2 IR 111.

disregard of the risk of a criminal result that makes recklessness more morally culpable than negligence, and places it higher up the culpability hierarchy.

- 9.37 Recklessness can be distinguished from oblique intention (considered above) in that recklessness relates to the taking of an unjustified risk. Oblique intention relates to the taking of a risk which the risk taker is aware is highly likely to occur, though this risk is not his or her aim.
- 9.38 The fault element of wilful blindness has been treated as synonymous with connivance, which will be considered further below.<sup>53</sup>
- 9.39 In a similar manner to which knowledge is distinct from intent, but sits alongside it in terms of the level of culpability it represents, wilful blindness is a separate mental element that sits alongside recklessness in terms of gravity and culpability. Like knowledge, wilful blindness is a fault element that is generally used in offences that criminalise a circumstance rather than a result. Where knowledge can be defined as a “true belief”, wilful blindness has been described as “a degree of awareness of the likely existence of the prohibited circumstance coupled with a blameworthy conscious refusal to enlighten one-self.”<sup>54</sup> Wilful blindness is something more than mere suspicion, as it also requires an intentional failure to resolve that suspicion. The culpability of this mental state arises from the blameworthy choice not to inform oneself.
- 9.40 As noted above, a court will be willing to infer actual knowledge from a person’s deliberate failure to inform his or herself of a circumstance, in limited circumstances. However, while a deliberate failure to seek information may indicate that a person knows something, the fact of a person’s wilful blindness to a circumstance does not automatically mean they know of that circumstance. It is for this reason that the 2010 *Draft Criminal Code* of the Criminal Law Codification Advisory Committee does not equate wilful blindness with knowledge, suggesting that wilful blindness “is more akin to recklessness [...] than knowledge. [...] Wilful blindness may be almost as culpable a state of mind as actual knowledge, but it is not the same state of mind.”<sup>55</sup>
- 9.41 Wilful blindness is similar to recklessness in that it requires a conscious disregard of risk; however, it is a narrower concept than recklessness as wilful blindness is confined to the refusal to make inquiry.<sup>56</sup>

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<sup>53</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 144.

<sup>54</sup> Ormerod and Laird, *Ibid.* at 144.

<sup>55</sup> Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (TSO 2010) at 85-86.

<sup>56</sup> The Canadian Supreme Court in *R v Williams* [2004] 2 LRC 499, at 27, quoting from the judgment of McIntyre J in *Sansregret v R* [1985] 1 SCR 570 at 584, stated: “while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry



**(c) Gross Negligence**

9.42 This class of criminal fault, generally requires less culpability than those classes considered above.<sup>57</sup> The leading case regarding this class of fault is *The People (Attorney General) v Dunleavy*,<sup>58</sup> in which the Supreme Court laid down a test for gross negligence manslaughter. A person will be held to have been grossly negligent where:

- (1) a person was, by ordinary objective standards, negligent; and
- (2) the negligence caused the death of the victim; and
- (3) the negligence was of a very high degree; and
- (4) the negligence involved a high degree of risk or likelihood of substantial personal injury to others.<sup>59</sup>

9.43 Like recklessness, this fault element involves an assumption of a risk. However, in this case, culpability does not arise due to the person's subjective disregard of the risk. The person's subjective awareness is irrelevant. Rather, culpability arises in circumstances in which the person ought to have known of the risk (a reasonable person in the same circumstance would have been aware of the risk) and conducts him or herself in a manner far below that which would be expected of a reasonable and prudent person in the same circumstances. Unlike recklessness, this category of fault applies an objective standard.

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declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant."

<sup>57</sup> Gross negligence is often argued to embody less moral blameworthiness/culpability than the subjective fault elements discussed above. The rationale behind this argument is that objective fault does not require an individual's advertence to wrongdoing inherent in their conduct or the result they are pursuing. However, it has also been argued that an individual's "failure to meet objective standards does reflect adversely on him" in a manner that can justify a judgment of moral blameworthiness/culpability on that person: see Simester, "Can Negligence be Culpable?" in Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP 2000) on this point. If Simester's view is taken, the fault element of gross negligence, which requires an individual fall far below objective standards may allow a grossly negligent person to be judged as being culpable to a high degree. In this jurisdiction, there is a commonly held view that subjective fault is generally required to justify the imposition of serious criminal liability (this understanding was noted by the Court of Appeal in its judgment in *The People (DPP) v O'Shea* [2017] IESC 41, [2017] 2 ILRM 149). However, the view that objective fault can embody sufficient inherent blameworthiness to justify the imposition of serious criminal liability has been recognised at common law (the common law offence of gross negligence manslaughter), in legislation (the offence of careless driving causing the death pursuant to section 52 of the *Road Traffic Act 1961*, as amended by section 4 of the *Road Traffic Act (No.2) 2011*), and in case law such as *Dunleavy*. It is also worth noting that, in the context of corporate offences, such as under the *Competition Act 2002*, strict liability offences (with a due diligence-type defence) have been enacted carrying significant fines on conviction on indictment.

<sup>58</sup> *The People (Attorney General) v Dunleavy* [1948] IR 95.

<sup>59</sup> This distillation of the *Dunleavy* principles was outlined in the Law Reform Commission, *Report on Corporate Killing* (LRC 77 - 2005) at 15.

Gross negligence differs from simple negligence in that the degree of negligence required is “considerably higher”.<sup>60</sup>

#### **(d) Simple Negligence and Constructive Knowledge**

- 9.44 Simple negligence, or constructive fault, as a category of criminal fault corresponds with the civil law standard of negligence. Like both recklessness and gross negligence, it involves an assumption of a risk. Again, like gross negligence, this category of fault applies an objective standard. A person will fulfil this requirement by falling below the standard of conduct that would be expected of them by a reasonable and prudent person. The person need not be aware that he or she is falling below this standard. The person’s contravention of this standard need not be of such a level as would be required for a person to be grossly negligent.
- 9.45 The Law Commission of England and Wales, in a 2010 Consultation Paper, criticised the negligence standard on the basis that it results in undue harshness for a defendant because it may lead to criminal liability for “simple neglect”.<sup>61</sup> It must be noted, however, that an objective test of negligence forms the basis for gross negligence manslaughter. It also forms the basis of many corporate offences. Many of the corporate offences for which a director, senior manager or similar officer could face personal criminal liability are themselves often strict liability offences and in some limited instances absolute liability offences (with no due diligence defence), such as failure to file a company’s annual return under the *Companies Act 2014*. It is worth noting that a strict liability offence often attracts a defence of due diligence, which may equate to an objective standard of reasonable care,
- 9.46 The Commission is of the view that when this form of culpability is used appropriately, it does not necessarily result in undue harshness to a defendant, particularly where in a corporate setting the processes and procedures required to meet the standard of negligence are within the peculiar knowledge of the senior managers and comparable agents. Moreover, as noted by the Supreme Court in *The People (DPP) v Hegarty*,<sup>62</sup> which concerned the prosecution of a senior manager under the *Competition Acts*, the regulatory purpose behind such legislation would be greatly diminished if it did not include provision for such personal criminal liability. It may be that this standard of culpability results in a lower burden on the prosecution by comparison with an offence that requires proof of a subjective fault requirement, but the reasoning of the Supreme Court in *Hegarty* provides a clear policy justification for enacting offences of this type.

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<sup>60</sup> Law Reform Commission, *Report on Corporate Killing* (LRC 77 - 2005) at 17.

<sup>61</sup> Law Commission of England and Wales, *Consultation Paper: Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 144, at paragraph 7.48 noting that the “real harshness of the extended doctrine comes, of course, from the fact that, on the basis of simple neglect, an individual director may be convicted of the offence itself”. See also the UK House of Lords decision in *R v G* [2004] UKHL 50, [2004] 1 AC 1034.

<sup>62</sup> *The People (DPP) v Hegarty* [2011] IESC 32.

- 9.47 Following on from the trend demonstrated by knowledge and wilful belief as knowledge-based fault elements related to intention and recklessness respectively, constructive knowledge is a concept related to negligence.
- 9.48 A person will have constructive knowledge where he or she reasonably ought to have known of a circumstance. The actual awareness of the person is not relevant to whether he or she has constructive knowledge, nor is the person's subjective choice to avoid becoming aware of the information in question. In these ways, constructive knowledge is distinct from knowledge and wilful blindness. A person will have constructive knowledge when he or she has "the means of knowledge",<sup>63</sup> as distinct from the knowledge itself. As such, the act of merely failing to make inquiries may be sufficient for a person to have constructive knowledge. Constructive knowledge, therefore, applies an objective standard.
- 9.49 Unlike knowledge and wilful belief, constructive knowledge does not form the fault element of any crime under Irish law. It has been suggested that this concept "generally speaking, does not have any place in criminal law",<sup>64</sup> and certainly "has no place in our criminal law of establishing intent."<sup>65</sup> However, constructive knowledge is relevant to the crimes that have negligence as the criminal fault element. Where negligence is the fault element of an offence that criminalises an omission, the criminal fault can be satisfied where the surrounding circumstances put a person on notice or inquiry so as to require him or her to take steps, and that person fails to take such steps.<sup>66</sup>

**(e) Strict and absolute liability**

- 9.50 Strict and absolute liability offences allow criminal liability to be imposed upon a person based solely on that person having voluntarily carried out certain criminal conduct or having brought about a specific criminal result. These types of offences do not require the prosecuting entity to prove any of the above levels of culpability as a pre-requisite to imposing criminal liability.
- 9.51 Strict and absolute liability offences are exceptions to the general presumption that the criminal law will not seek to impose liability upon a person who is not either morally blameworthy, or in some other way at fault, for some criminal conduct or result. The main arguments in favour of maintaining these exceptions are that:

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<sup>63</sup> *Taylor's Central Garage (Exeter) Ltd v Roper* [1951] 2 TLR 284, at 288.

<sup>64</sup> *Ibid.* at 289.

<sup>65</sup> *The People (DPP) v Murray* [1977] IR 360, at 386.

<sup>66</sup> *R v P Ltd and G* [2007] EWCA Crim 1937, at paragraph 13.

- (1) they are needed on policy grounds, including for the maintenance of public safety and where they support relevant regulatory goals, as acknowledged by the Supreme Court in *The People (DPP) v Hegarty*<sup>67</sup>;
- (2) their application is generally confined to areas of activity that require a voluntarily assumption of risk, which justifies the imposition of liability upon a person who assumed that risk should it become manifest; and
- (3) requiring proof of fault in certain circumstances would in effect render the criminal law ineffective.<sup>68</sup>

9.52 The distinction between strict and absolute liability is that, while neither category of offence requires the prosecution to prove fault on the part of a defendant, strict liability offences will include a defence that will allow a defendant to demonstrate his or her lack of culpability in order to avoid liability. Generally, the defence will be that the defendant had taken all reasonable steps or otherwise exercised due diligence (which is discussed in detail in Chapter 10, below). Absolute liability offences will not provide any such defence. As such, strict liability offences allow some account to be taken of the blameworthiness of a defendant, whereas absolute liability offences do not. It is for this reason that strict liability appears higher on the culpability hierarchy than absolute liability.

#### **(f) Disparity of Culpability/Unfair Labelling**

9.53 One of the issues to be considered by the Commission in this chapter is the range of culpability that should be required of a corporate agent who contributes to or facilitates corporate offending, prior to imposing criminal liability. The Commission recognises that the level of culpability that may be found in a corporate agent may not coincide with that of the corporate body committing the substantive offence. An agent may intentionally or recklessly contribute to the commission of a negligence based or strict liability offence committed by the corporate body. Secondary liability in criminal law has long recognised the circumstances in which the culpability of the secondary participant can be as deserving of criminal sanction as the principal offender,<sup>69</sup> if not more deserving.<sup>70</sup> In such a circumstance, it may be fair to sanction the secondary participant as if he or she were the principal offender.

9.54 However, there may also be circumstances in which a corporate agent may act with a lower level of culpability than the corporate offender. What liability should the agent accrue based upon his or her negligent facilitation of the commission of an intention or recklessness based offence by the corporate body? In such a case, is it fair to treat and

<sup>67</sup> *The People (DPP) v Hegarty* [2011] IESC 32, discussed above.

<sup>68</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 69.

<sup>69</sup> See McIntyre et al, *Criminal Law* (Round Hall 2012) chapter 13 for a discussion of degrees of complicity in crime in general.

<sup>70</sup> Williams, *Textbook of Criminal Law* (Stevens & Sons 1978) at 287.

label the negligent secondary participant in the same way as the demonstrably more culpable principal offender? On the other hand, would it be appropriate for the secondary participant, who negligently facilitated the commission of an offence, to avoid liability? These issues will be considered in relation to each of the liability models considered in this chapter under the subheadings of disparity of culpability and unfair labelling.

- 9.55 As discussed in the Issues Paper for this project,<sup>71</sup> it is arguable that the choice between a subjective or objective fault element in a legislative provision attributing secondary liability to a corporate agent should be contingent upon the type of culpability required in the substantive corporate offence. The type of culpability required of the secondary offender should correspond to the type of culpability required by the substantive offender. The Issues Paper outlined examples of secondary liability provisions (consent, connivance and neglect provisions) where this tracking between the culpability of the secondary offence and the substantive offence is not apparent.<sup>72</sup>
- 9.56 Using an objective standard to impose liability for a subjective fault based offence that results in the stigmatisation of, or application of moral opprobrium to, the defendant has been criticised.<sup>73</sup> This criticism flows from the fact that the secondary participant is being held liable for the same crime as the primary participant, resulting in the same criminal labelling and potential exposure to the same criminal sanction, despite the secondary participant being held liable based on a lower level of culpability.<sup>74</sup>
- 9.57 There are also examples of secondary liability provisions<sup>75</sup> that require the prosecution to prove a higher level of culpability (subjective fault) than they are required to prove as against the substantive offender (objective fault).
- 9.58 It is arguable, as reflected in the response of consultees to the Issues Paper on this project, that this disparity arises from the lack of clarity in Irish criminal law regarding how to attribute subjective fault to corporate bodies. Assuming that the recommendations on that subject made in Chapter 8 are implemented, the Commission agrees with consultees that the model for secondary or derivative liability recommended in this Chapter should avoid the disparity that has arisen in some existing statutory schemes.
- 9.59 Aside from provisions that fail to track the objective or subjective fault requirements of a substantive offence through to the secondary offence, it is clear from the above analysis

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<sup>71</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8-2016), see Issue 8.

<sup>72</sup> *Ibid.* at paragraphs 8.13-8.14.

<sup>73</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 141.

<sup>74</sup> See Law Commission of England and Wales, *Report on Participating in Crime* (CP No 305 2007) for a detailed discussion of the concept of “parity of culpability”.

<sup>75</sup> Section 22 of the *Criminal Justice Act 2011* which will be considered in greater detail in the analysis of consent, connivance, or neglect provisions.

that, even within subjective fault, different levels of culpability can be distinguished. A person who knowingly or intentionally commits a criminal act is more culpable for their conduct than a counterpart who recklessly commits a comparable act.

9.60 Any scheme allowing for the attachment of secondary liability to corporate agents will need to be formulated so to avoid the risk of a disparity of culpability for the secondary participant. The Commission favours a formulation that allows a secondary participant to be held liable in circumstances in which their culpability is greater than or equal to that required to hold the primary participant liable. This allows such a scheme to be applied generally, without the risk of a secondary participant to an offence being held liable for an offence despite having a lower level of culpability than the primary participant had.

9.61 One of the main secondary liability provisions for which the Irish criminal law currently provides, is the consent, connivance or neglect model, which will be considered in greater detail below. This model allows the prosecuting entity to retain the option of relying upon whichever liability trigger is most advantageous to a prosecution, regardless of whether it results in a disparity of culpability. The Commission is aware that an effect of requiring the culpability requirement for imposing secondary liability to track the requirement of the substantive offence will be, in certain circumstances, to increase the burden on prosecutors.

9.62 As noted above, the consensus view of the submissions to the Issues Paper for this Report was that whatever formulation a generally applicable scheme of liability of individual corporate officers takes, it should not have the effect of making the evidential burden on the prosecutor so onerous as to render a successful prosecution impossible or improbable. Despite this, the Commission is of the view that it is inappropriate to retain this risk of a defendant being held liable for an offence because of their secondary participation in the commission of that offence based on a lower level of culpability than is required to be held primarily liable.

9.63 It was noted in Chapter 8 that one of the functions of the criminal law is to provide an institutional framework for certain social values.<sup>76</sup> When the law fails to state what it requires in a clear way, this value-setting function of the criminal law is undermined. Equally, this clarity is also necessary to provide justice for the sake of both the offender and for society (in allowing justice to be both done and seen to be done). It would not be acceptable for the law to simply label all offenders as “criminals”, because this would unfairly equate distinct offending. It is to avoid this type of unjust outcome that the

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<sup>76</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 5th ed (Hart 2013) at 7: “When a legislature marks some action as criminal [...] it condemns it and rules it out as an acceptable option for citizens.”

criminal law must outline its requirements with precision and clarity. This is known as the principle of fair labelling.<sup>77</sup>

9.64 Application of a secondary/derivative liability model results in the secondary participant being labelled, and subjected to the same potential punishment as the principal offender (these are derivative liability provisions).

9.65 The principle of unfair labelling is related to the issue of disparity between the culpability of the principal and secondary offenders. A difficulty clearly arises when labelling a convicted secondary participant in the same way as the principal offender, where the fault required of the participant fails to track that of the principal offender. However, in addition, the conduct of the secondary participant will never be on all fours with the conduct element of the substantive offence.<sup>78</sup> It is for these reasons that secondary liability provisions present a risk of contravening the principle of fair labelling.

9.66 A significant basis for the unfairness inherent in unfair labelling is the potential for liability to be imposed on the basis of a lower level of culpability than would be required in order to be held primarily liable. Formulating a general scheme of liability to ensure parity of culpability, as discussed above, would also assist in mitigating the risk of unfairness in labelling.

9.67 Even with steps taken to ensure that parity of culpability is required to impose liability, a secondary liability scheme can never require that there must be parity in relation to the conduct element of the offence, as this would render any secondary liability mechanism redundant (it would essentially be imposing primary liability). It has been acknowledged that the existence of legal mechanisms to impose liability on individuals who have culpably contributed to or facilitated the substantive offending of another person are necessary so as not to leave the body of criminal law under-inclusive.<sup>79</sup>

9.68 As will be seen in the “conduct of the agent” and “scope of persons subject to liability” sections below, this chapter specifically considers the issue of imposing liability on corporate agents with a certain level of control over a corporate body, based on specific culpable involvement with corporate offending. The justification for imposing this liability is an acknowledgement that such agents can contribute to the substantive offending and bear responsibility for the harm which results from that offending.

9.69 The conduct of the secondary participant does not usually rest on all fours with that of the principal offender. However, in circumstances where that secondary participant has been proved to have acted with the same or a greater level of culpability than the principal offender, the Commission is of the view that the secondary participant’s contribution to

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<sup>77</sup> Simester, *Ibid.* section 2.4.

<sup>78</sup> Law Commission of England and Wales, *Report on Participating in Crime* (Law Com No 305 2007) at 15 – the Law Commission outlines the “labelling difficulty” inherent in secondary liability.

<sup>79</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 454.

the offence justifies labelling the secondary participant in the same way as the principal offender.

- 9.70 When examining each of the “culpability of the agent” provisions in the five models considered in this chapter, each provision shall be analysed in the following terms: where it falls on the hierarchy of culpability, or whether it provides for a fault element which diverges from this hierarchy, and; whether it is subject to the disparity of culpability or unfair labelling criticism considered above.

### 3. Conduct of the agent

- 9.71 It is a fundamental aspect of the criminal law that a person may not be held criminally liable based upon his or her culpable mental state or objective fault alone. The fault element of an offence must be made manifest by some conduct on the part of the person. The criminal conduct will most frequently be either a criminalised act (such as in the offence of rape) or the person having conducted him or herself in such a way as to bring about a criminal result (such as in the offence of murder). There is a general reluctance in the criminal law to criminalise conduct in the form of an omission; however, in certain circumstances the criminal law will allow for the imposition of liability based upon a culpable omission.

- 9.72 In the case of each of the liability models considered in this chapter, this fundamental aspect of criminal law is adhered to. The nature of these models is such that a defendant will not be required to have perpetrated the conduct element of a substantive offence (this will be done by the principal offender). The person cannot be found to be criminally liable without proof of his or her perpetration of some conduct that has contributed to or facilitated the commission of the substantive offending.

- 9.73 The liability imposed by each of the models is derivative in nature, and so each model requires proof that a principal offence took place. While the commission of the principal offence is generally an act external to the secondary participant (with the exception, in limited circumstances of the officer in the default model in the *Companies Act 2014*),<sup>80</sup> the secondary participant’s liability is derived from the commission of this substantive offence by another, which the secondary participant contributed to or facilitated. As such, proof of this principal offence is a core part of the conduct element of the complicity models considered. However, the conduct element of each model also includes additional factors, which relate to a defendant’s complicit contribution to, or facilitation of the principal offence.<sup>81</sup>

- 9.74 Defining the scope of the conduct that can trigger derivative liability in any of the models considered is important in order to ensure certainty as to what forms of criminal

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<sup>80</sup> As discussed in the Officer in Default model outlined, 9.191, below.

<sup>81</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 359.



involvement do and do not attract liability.<sup>82</sup> One of the key distinctions between derivative liability and primary liability is the nature of the conduct that can trigger liability. In order to be held primarily liable for a particular offence, it will have to be proved that an offender committed the conduct element (*actus reus*) of the substantive offence, which will be set out in statute or at common law. In order for an offender to be held liable under the models considered in this chapter, it will not be necessary to prove that the offender committed the conduct element of the substantive offence, but rather that the offender has satisfied the conduct element of the complicit liability model in question.

9.75 While each of the liability models considered require some culpable conduct on the part of a person, the scope of conduct that is sufficient to ground liability differs between each model. The scope of the conduct element of each model is of essential importance in determining whether the model can effectively impose liability to all contributions to, or facilitations of, offending which the criminal law wishes to deter and punish.

9.76 This chapter specifically addresses situations where certain corporate agents are culpable in relation to the offending of corporate bodies. Not all persons who contribute to or facilitate an offence will be operating with the decision-making powers, authority, or control over the actions that result in the commission of an offence. In a situation in which a corporate agent has the ability to prevent offending, and he or she has adopted a managerial function of supervision, or the authority to control the area in which the offending has occurred, and has permitted or failed to prevent this offending from being committed by the corporate body (through one of its agents), this conduct may be sufficient to impose derivative liability.<sup>83</sup>

9.77 As noted above, the criminal law is reluctant to impose liability based upon an omission, and in particular, the Irish criminal law does not usually criminalise a party's failure to take steps to prevent the commission of an offence by another. However, there are exceptions to this general rule. Two of these exceptions are:

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<sup>82</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 462.

<sup>83</sup> The aids, abets, counsels, or procures model has been interpreted by the courts of England and Wales to equate the "passive acquiescence" of a senior managerial agent to "aiding and abetting" in *JF Alford Transport Ltd* [1997] 2 Cr App R 326, [1997] Crim LR 745. At first instance, the managing director of a company was convicted of aiding and abetting an employee (a driver) of the company making a false entry on the tachograph record. The director appealed against his conviction arguing that the trial judge, in summing-up, wrongly indicated to the jury that passive acquiescence was sufficient to amount to aiding and abetting. On appeal it was held that what mattered was knowledge of the principal offence coupled with the ability to control the action of the offender and the deliberate decision to refrain from doing so; that in the present case it would have had to have been proved that each appellant intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime, but he need not have intended that the crime be committed, so that if the management's reason for turning a blind eye was to keep the drivers happy rather than to encourage the production of false tachograph records that would afford no defence; but there being no sufficient evidence of knowledge by these appellants of the principal offence, the convictions would be quashed.

- (1) liability based on a failure to discharge a legal duty;<sup>84</sup> and
- (2) a broader concept of liability flowing from a failure to exercise a legal right/power to prevent the commission of an offence, in circumstances where the secondary participant had an opportunity to intervene.

9.78 A corporate agent's failure to prevent the offending of the corporate body may on occasion result in a failure to discharge a legal duty;<sup>85</sup> however, it will not always be the case that an agent will be under such a duty.

9.79 A more common scenario in the corporate context will be where a corporate agent is not under a legal duty to prevent offending conduct, but does have a specific legal power to control the primary perpetrator's activity where that perpetrator is a subordinate employee acting as an agent of the corporate body. The imposition of secondary liability for a failure to exercise a legal power to prevent offending has been recognised in English law. The English Court of Appeal in *R v Webster*<sup>86</sup> confirmed that "failure by [the secondary participant] to exercise a legal power (not duty) of control over [the principal's] activity may be, without more, constitutive of secondary participation in crime." (emphasis added).<sup>87</sup>

9.80 It might be argued that criminalising a mere failure to exercise a legal right or power, as distinct from a failure to satisfy a legal duty, would be to extend the criminal law too far. The Law Commission of England and Wales have noted that "we do not think it would be acceptable if [a secondary participant] could be criminally liable for encouraging or assisting [a principal offender] to commit a crime merely because [the secondary

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<sup>84</sup> *Russell* [1933] VLR 59; for further discussion on secondary liability for an omission resulting in a breach of duty see Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 5th ed (Hart 2013) at 214.

<sup>85</sup> Section 19 of the *Criminal Justice Act 2011* introduced a very broad reporting obligation on any "person" who "has information which he or she knows or believes might be of material assistance in – (a) preventing the commission by any other person of a relevant offence, or (b) securing the apprehension, prosecution or conviction of any other person for a relevant offence". "Relevant offence" means any of a series of business of commercial type offences (or secondary participation in such offences) as are listed in schedule 1 of the 2011 Act, or are specified in a Ministerial order made pursuant to section 3(2) of the 2011 Act. Failure "without reasonable excuse" (a due diligence defence) to satisfy this obligation will amount to an offence.

<sup>86</sup> [2006] EWCA Crim 415, [2006] 2 Cr App R 6, at paragraph 28.

<sup>87</sup> See Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 5th ed (Hart 2013) at 215. The England and Wales Court of Appeal was confirming the law as laid down in *Du Cros v Lambourne* [1907] 1 KB 40. In this case A owned a car which had been driven dangerously. It was unclear whether A or his companion B was driving at the time. A was convicted as a party to the dangerous driving and it was suggested by the court that it was irrelevant whether or not he was the principal offender or secondary participant as, even if B were driving, A had a legal power to direct the manner in which B drove and his failure to exercise this power was acquiescence of B's dangerous driving. Recognition of this ground for secondary liability has not been consistent. In *Cassady v Reg Morris Transport Ltd* [1975] RTR 470 an employer's failure to forbid offending by an employee was found only to amount to evidence of encouragement, rather than constituting encouragement in and of itself. Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 5th ed (Hart 2013) at 216.

participant] failed to take action to prevent [the principal offender] committing the crime.”<sup>88</sup>

9.81 However, a distinction can be drawn between the case of a secondary participant who is a stranger to the primary perpetrator, and the case of a secondary participant exercising a supervisory or control function over the primary perpetrator. The assessment of the Law Commission of England and Wales was in the context of the failure of a stranger to an offence to act as a “good Samaritan” or “busy-body”. In the case of a managerial supervisor, the supervisor is not a mere stranger who happens upon the offending, but rather they have a specific power to control the general conduct of the primary perpetrator. Without resorting to the extension of the criminal law to include a general duty to prevent offending, in this case it is reasonable to conclude that the supervisor, by failing to exercise that specific power of control to prevent the offending, does contribute to the wrongdoing, and so does participate in that wrongdoing.<sup>89</sup> The extension of the criminal law to cover the case of someone exercising a controlling supervisory function failing to exercise legal control over a subordinate, resulting in offending, has been accepted by the courts.<sup>90</sup>

9.82 When examining each of the “conduct of the agent” provisions of each of the models of corporate agent liability considered in this chapter, the Commission will analyse each in terms of how the scope of conduct targeted by each provision covers the range of conduct that merits criminal liability, in the context of the peculiar circumstances of corporate agents who contribute to or facilitate corporate offending.

#### 4. Scope of persons to be subject to liability

9.83 Of the six models of liability being analysed in this chapter, two are generally applicable in that any party who has the capacity to be held criminally liable can accrue liability under these models. These two models are the aids, abets, counsels or procures model, and the *French Penal Code’s* accomplice provision. The remaining four models are qualified in their application, in that they only apply to a defined scope of parties. The reason for this qualified scope of application is that these models are designed only to address the

<sup>88</sup> The Law Commission of England and Wales, *Report on Participating in Crime* (Law Com No 305 2007) paragraph 3.40.

<sup>89</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 5th ed (Hart 2013) at 217-218.

<sup>90</sup> *JF Alford Transport Ltd* [1997] 2 Cr App R 326, [1997] Crim LR 745. See fn. 83 above;

*Gaunt* [2003] EWCA Crim 3925, [2004] 2 Cr App R (S.) 37. The general manager of a company pleaded guilty to racially aggravated harassment on the basis that he was aware that, over a period of several years, three employees of the firm subjected a fourth employee to verbal and physical abuse which had racial overtones, but did nothing to stop it happening. The appellant appealed the severity of his sentence. Before the Court of Appeal, the appellant accepted that his inaction might have been taken by those responsible for the incidents as encouragement.

*Tuck v Robson* [1970] 1 All ER 1171 a public house licence holder was held to have passively assisted patrons to drink after the licenced hours by “presence with no step being taken to enforce his right either to eject the customers or at any rate to revoke their licence to be on the premises” (at 1175).

complicated conduct of specific influential position holders in corporate bodies or undertakings.

9.84 As is made clear in Chapter 8, the Commission is of the view that corporate culpability for the commission of an offence can be located within the scope of a delegated decision-making power, even at a relatively low point in the corporate management hierarchy. In addition, corporate bodies must act through their agents and the conduct element of any substantive offence that a corporate body commits will be brought about by the conduct of an agent, which may again be placed even at the lowest point in the corporate management hierarchy. However, in this chapter, the Commission is not concerned with agents at all levels of the corporate body's managerial structure.

9.85 Broadly speaking, the Commission is concerned with mechanisms that allow liability to be imposed upon what the Supreme Court in *The People (DPP) v Hegarty*<sup>91</sup> described as "certain influential position holders... essentially those without whose involvement the offending conduct could not be endorsed or approved." This chapter includes a review of Irish criminal law, and comparator models from a common law and civil law jurisdiction. The purpose of the review is to determine whether it properly caters for the ascribing of liability to persons with a high level of responsibility in corporate decision-making, due to their culpable exercise of that responsibility.

9.86 As noted in the "conduct of the agent" section, this chapter seeks to address certain corporate agents' culpable contribution to, or facilitation of, corporate offending, including where that contribution or facilitation is by way of a failure to exercise a specific authority or control of that agent. As noted under the liability for omissions sub-heading, the imposition of liability upon a person based upon the offending of another person is something that the criminal law is reticent to do, but that may be justified based upon the authority and control wielded by certain corporate agents.

## 5. Burden shifting provision

9.87 Both the "consent, connivance or neglect" model, and the "officer in default (*Companies Act 2014*)" model include reverse evidentiary burden provisions. Both of these provisions are considered in turn. However, prior to engaging in this analysis, reverse burden provisions are considered having regard to two issues:

- (1) the constitutionality of reverse evidential burden provisions, and
- (2) the reasons for providing for an evidential burden shifting provision in a mechanism designed to impose liability upon certain corporate agents for their culpable contribution to or facilitation of corporate offending.

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<sup>91</sup> *The People (DPP) v Hegarty* [2011] IESC 32; [2011] 4 IR 635, at 644.

9.88 Before moving to consider the constitutionality of reverse burden provisions, the definitions of two different burdens – the ‘legal’ burden and the ‘evidential’ burden – are set out as follows:

“The ‘legal burden’ [...] is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. Where the legal burden is borne by a party in relation to an issue, he or she is required to persuade the tribunal of fact to the criminal [...] standard of proof [...] [T]he prosecution can only discharge its legal burden by proving a matter beyond a reasonable doubt.”

“The ‘evidential burden’ is the burden borne by a party of adducing sufficient evidence to satisfy the trial judge that an issue should be left to the tribunal of fact [...] The evidential burden is discharged when the party on whom it is placed adduces sufficient evidence to prevent the trial judge withdrawing the issue from the tribunal of fact.”<sup>92</sup>

9.89 The ordinary rules of criminal law require that all elements of a criminal offence be proved by the prosecution beyond a reasonable doubt. This is required in order to satisfy the defendant’s presumption of innocence.<sup>93</sup> Article 38.1 of the Constitution provides a guarantee that trials be held in due course of law. It has been recognised by the courts of Ireland that the presumption of innocence is an essential element of this protection.<sup>94</sup> In addition, the presumption of innocence is expressly protected by the *European Convention on Human Rights*,<sup>95</sup> to which Ireland is a signatory, and which is incorporated into Irish law on a sub-constitutional basis in the *European Convention on Human Rights Act 2003*.<sup>96</sup>

9.90 When a statutory provision seeks to shift one of the burdens onto the defendant, such a provision may become subject to constitutional scrutiny.

9.91 The case-law regarding the constitutionality of burden-shifting provisions indicates the following:

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<sup>92</sup> McGrath, *Evidence* (Round Hall 2014) at 23-24.

<sup>93</sup> *Woolmington v DPP* [1935] 1 AC 462.

<sup>94</sup> *O’Leary v Attorney General* [1993] 1 IR 102 (High Court), [1995] 1 IR 254 (Supreme Court).

<sup>95</sup> Article 6(2) of the Convention provides “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

<sup>96</sup> The 2003 Act places an obligation on the courts to interpret Irish domestic law in a manner that is consistent with the Convention.

- (1) Provisions that shift the evidential burden only from the prosecution onto the defendant will not infringe a defendant's constitutionally guaranteed presumption of innocence;<sup>97</sup>
- (2) Provisions that shift the legal burden will not infringe a defendant's constitutionally guaranteed presumption of innocence, in cases where the provision can satisfy a proportionality test; and
- (3) Provisions that shift the legal burden in a manner that disproportionately impinges on a defendant's constitutionally guaranteed presumption of innocence will be found to be unconstitutional.<sup>98</sup>

9.92 This represents a summary of the law in this area. However, it has been noted that "[w]hile the recent decisions show a willingness to 'read down' reversed burden provisions so that only an evidential burden is placed on the accused, such an approach cannot be taken for granted."<sup>99</sup>

9.93 It is the Commission's view that, given the general application of any such scheme, it would not be suitable to recommend a legal burden shifting provision. Given the uncertainty in assuming that a court will "read down" any recommended provision to ensure that it only provides for a shifting of the evidential burden, care must be taken in recommending whether, and what form, a reverse burden provision might be included in a new scheme of corporate officer derivative liability. To safeguard against uncertainty as to how the courts may interpret a reverse burden provision, certain provisions have expressly provided for the nature of the burden to be placed on the defendant.<sup>100</sup>

9.94 Placing an evidential burden on a defendant in relation to certain facts in issue, which are only likely to be in the knowledge of that defendant, is reasonable and accepted in law.<sup>101</sup>

9.95 The reverse burden provision contained in section 81 of the *Safety, Health and Welfare at Work Act 2005* was initially recommended and justified because the nature of the offending in question related to "the organisation of a place of work" which was knowledge "peculiarly within the employer's province".<sup>102</sup> As knowledge regarding the offending conduct is likely to "peculiarly" lie with a defendant, this places the prosecuting entity at an evidential disadvantage. As such, while this reversal displaces the normal

<sup>97</sup> *O'Leary v Attorney General* [1993] 1 IR 102 (High Court), [1995] 1 IR 254 (Supreme Court); *Hardy v Ireland* [1994] 2 IR 550.

<sup>98</sup> *In Re The Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>99</sup> Guerin, "Cutting the Golden Thread: The Reverse Burden of Proof in Criminal Trials", paper delivered at the Bar Council Annual Conference, January 2012 at 23.

<sup>100</sup> For example, section 3 of the *Competition Act 2002* expressly distinguishes where the Act intends for a legal burden or an evidential burden to be shifted.

<sup>101</sup> See O'Malley, *The Criminal Process* (Round Hall 2009) at 90.

<sup>102</sup> Byrne, *Annotation to Safety, Health and Welfare at Work Act 1989*, Irish Current Law Statutes Annotated (RoundHall, Sweet & Maxwell 1989).

allocation of burdens in a criminal trial, it is justified in order to prevent “[c]onsistent failure to prove cases [which] would erode the moral authority of law and ultimately the effectiveness of the system,” which is at risk due to the potential unavailability of such knowledge.<sup>103</sup>

9.96 This principle of peculiar knowledge<sup>104</sup> is likely to be generally present in cases concerning the liability of certain corporate agents for their contribution to, or facilitation of, corporate offending. Liability in such cases will necessarily be based upon the agent’s act or omission in relation to their function in the decision-making of the corporate body.

9.97 In the following sections, the different approaches taken in the “officer in default (*Companies Act 2014*)” model and the “consent, connivance and neglect” model will be analysed and contrasted with a view to determining what, if any, reverse burden provision will be included in a recommended scheme of corporate agent complicit liability.

## C. Different Models for Imposing Derivative Liability

9.98 This chapter considers five different models that provide for liability to be imposed upon a corporate agent based upon his or her culpable contribution to, or facilitation of, the commission of an offence by a corporate body. The five models are as follows:

- (1) Aids, abets, counsels, or procures model
- (2) Consent, connivance or neglect model
- (3) Officer in default model
- (4) Common law jurisdiction comparator: Officer in default model (UK)
- (5) Civil law jurisdiction comparator: accomplice provision model (France)

9.99 The first three models are currently applicable in Irish law. The Irish models provide for two different approaches taken to derivative criminal liability:<sup>105</sup>

- (1) A general derivative liability scheme is set out in statute. This scheme essentially provides that any person who aids, abets, counsels or procures the commission of any offence shall be liable to be indicted, tried and punished as a principal

<sup>103</sup> Barrington, *Report of the Commission of Inquiry on Safety Health and Welfare at Work* (1983).

<sup>104</sup> See Walsh, *Walsh on Criminal Procedure* 2nd ed (Round Hall 2016) at 1329-1330.

<sup>105</sup> This break down of secondary/derivative liability attribution models is based upon the breakdown of schemes of corporate liability model outlined by Professor Celia Wells, in her appendix to the Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (CP No 195 2010) at 204.

offender, unless some rule of law expressly excludes the imposition of such secondary liability;<sup>106</sup> and

- (2) Statutory specific schemes – which can be divided into two models:
- a. The authorised, consented to, or is attributable to connivance or neglect (or wilful neglect) model, which is used, in various forms, throughout legislation in this jurisdiction; and
  - b. The officer in default model provided by sections 270 and 271 of the *Companies Act 2014*.

9.100 Both of the statutory specific schemes of derivative liability are generally used in relation to statutory offences targeted at corporate bodies or collective undertakings. The last two are models found in other jurisdictions, which are included for comparison purposes:

- a common law jurisdiction comparator: the officer in default ((UK) *Companies Act 2006*) model; and
- a civil law jurisdiction comparator: the French Penal Code’s accomplice provision.

9.101 While each of these models differs in their language and formulation, some commonalities appear throughout each. Each model provides a means for criminal liability to be attributed to a corporate agent due to his or her culpable complicity in the corporate body’s offending, and the resultant harm. As such, each model requires proof of:

- (1) culpability on the part of the agent; and
- (2) proof of certain conduct (acts and/or omissions, depending on the model in question) on the part of the agent, of contribution to or facilitation of an offence on the part of the corporate body.

9.102 Each of these models shall be analysed further below, in terms of how each model deals with these two common elements, under the headings: “culpability of the agent” and “conduct of the agent”.

9.103 The aids, abets, counsels or procures model, and the *French Penal Code’s* accomplice provision are generally applicable provisions. However, the remaining models examined

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<sup>106</sup> This scheme is provided by section 7(1) of the *Criminal Law Act 1997*, in relation to indictable offences, and section 22 of *Petty Sessions (Ireland) Act 1851*, in relation to summary offences. Together, these provisions essentially provide that any person who aids, abets, counsels or procures the commission of any offence shall be liable to be indicted, tried and punished as a principal offender, unless some rule of law expressly excludes the imposition of such secondary liability. As noted at fn. 12 above, section 7 of the 1997 Act is a modernisation of section 8 of the *Accessories and Abettors Act 1861*, which provided that “Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be misdemeanour at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender”. The *Criminal Law Act 1997* repealed this Act, and section 7 of the 1997 Act removed the distinction between felony and misdemeanour offences.



are confined in their application, and are designed only to address the complicity of influential position holders in corporate bodies or undertakings. In the considerations of each model, in addition to addressing the culpability and conduct requirements of each model, the chapter will also analyse the “scope of persons to be subject to liability”.

9.104 Finally, both the consent, connivance or neglect model, and the officer in default model include reversed evidentiary burden provisions. As such, under these two models, each burden shifting provision shall be considered.

## 1. Aids, abets, counsels, or procures

9.105 Section 7 of the *Criminal Law Act 1997* provides that “[a] person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.” As noted above, the aids, abets, counsels or procures model is the sole generally applicable scheme for imposing secondary criminal liability in this jurisdiction. Section 7 of the *Criminal Law Act 1997* applies to indictable offences, and section 22 of the *Petty Sessions Act 1851* contains a comparable approach to summary offences.<sup>107</sup> As such, this is the only general scheme that the criminal law currently provides for a corporate agent to accrue liability for his or her contribution to or facilitation of offences committed by a corporate body. That is to say, it is the only applicable scheme where the consent, connivance or neglect provision, or the officer in default (*Companies Act 2014*) provision do not apply. An analysis of this liability scheme is required in order to determine whether the current state of criminal law adequately provides for the complicity of certain corporate agents in corporate offending.

9.106 To be held secondarily liable under the aids, abets, counsels or procures model, proof is required of a “necessary conduct element accompanied by the necessary mental element” of the secondary participant.<sup>108</sup> The fault element and mental element of this model shall now be considered in turn.

### (a) Participant’s fault

9.107 The fault requirement of the aids, abets, counsels or procures model of secondary liability allows liability to be imposed only on secondary participants who have demonstrated the greatest of culpability that appears on the criminal culpability hierarchy considered above: intention and knowledge. Recklessness or negligence on the part of the secondary participant will not be sufficient in order to accrue liability under this model.<sup>109</sup>

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<sup>107</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 357, note that “the effect of section 22 of the *Petty Sessions (Ireland) Act 1851* is that, broadly speaking, the same principles [as are applied by section 7 of the *Criminal Law Act 1997*] apply to summary offences.”

<sup>108</sup> This test was set out in *R v Stringer* [2011] EWCA Crim 1396, at 40, but is equally applicable in Ireland.

<sup>109</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 370; Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 226.

9.108 The fault element of this model has a number of strands, and requires that the secondary participant has:

- (1) the intention to perform the physical act (or in the case of an omission, the failure to act) of aiding, abetting, counselling or procuring;
- (2) the intention that the act or omission aid, abet, counsel or procure the commission of an offence;
- (3) knowledge that he or she was aiding, abetting, counselling or procuring the principal offender in the commission of the crime proved, or a crime of similar nature which the secondary participant knew was intended by the principal,<sup>110</sup> at the time of aiding, abetting, counselling or procuring.<sup>111</sup>

9.109 The aids, abets, counsels or procures model only provides for liability to be imposed based upon a person's intentional and knowing interaction with substantive offending. The effect of this is to prevent liability from being imposed based upon any other culpable contribution to, or facilitation of, a substantive offence.

9.110 This chapter specifically address the case of certain corporate agents' culpable interaction with the offending of corporate bodies. The circumstances with which the Commission is concerned are those where a corporate agent who has decision-making powers, authority, or control within the corporate body, and/or exercises a supervisory function, acts or fails to act in a manner which contributes to, or facilitates, to commission of an offence. The Commission is of the view that limiting that liability to circumstances in which the agent has acted intentionally or knowingly is unduly limiting.

#### **(b) Participant's conduct**

9.111 Liability imposed by the aids, abets, counsels or procures model is derivative in nature. As with the other liability models considered in this chapter, it is necessary to prove that a principal offence took place. This is a core part of the conduct element of the aids, abets, counsels or procures model; however, the conduct element of this model includes additional parts that relate to the specific contributory or facilitating conduct that must be proved in order for liability to be imposed.<sup>112</sup>

9.112 The conduct that allows secondary liability to be imposed on this model is conduct that falls within the definitions of aiding, abetting, counselling or procuring the commission of a principal offence. While the general principles of statutory interpretation dictate that

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<sup>110</sup> *Attorney General (S.P.U.C.) v Open Door Counselling Ltd* [1988] 1 IR 593, Hamilton P, at 616.

<sup>111</sup> This break down of the fault element of the aids, abets, counsels or procures model of secondary liability is adapted from McIntyre et al, *Criminal Law* (Round Hall 2012) at 369.

<sup>112</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 359.

each of these terms should cover a distinct form of complicit conduct,<sup>113</sup> throughout the history of their use, the terms aids, abets, counsels and procures have been used both interchangeably,<sup>114</sup> and as a unitary description of the conduct for which liability can be imposed.<sup>115</sup> As such, a definitive interpretation of any of the terms cannot be distilled from case-law, though an idea of the scope of conduct which falls under this model can be ascertained by looking at the courts' treatment of both the individual terms and the "aids, abets, counsels or procures" formulation as a whole.

(i) *Aiding*

9.113 "Aiding" is understood to mean "assisting or helping another person to commit an offence."<sup>116</sup> The inclusion of this term means that the provision of some form of help or assistance in the commission of the principal offence, even if it is trivial in nature,<sup>117</sup> can be sufficient to trigger liability. Assistance can range between a relatively minor level of engagement (such as engaging in the commission of a robbery by merely providing a place to hide the stolen goods)<sup>118</sup> to a very material level of interaction with the commission of the offence (such as transporting the primary participant in a murder, with the intended murder weapon, to the area in which the eventual victim resided)<sup>119</sup> on the part of the secondary participant.

9.114 In order to aid the commission of an offence, it is not necessary to establish that "but for" the assistance, the offence was committed. The ordinary standard of causation for primary liability need not be proved.<sup>120</sup> All that is required is that the assistance had some influence or connection to the substantive offending. The justification for imposing secondary liability is that the secondary participant involved him or herself in the commission of the crime, and so imposing the high burden of the "but for" test on the

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<sup>113</sup> This approach was espoused by Lord Widgery in *Attorney General's Reference No. 1 of 1975* [1975] QB 773, at 779.

<sup>114</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 462.

<sup>115</sup> McAuley and McCutcheon, *Ibid.* at 48.

<sup>116</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 361.

<sup>117</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 282.

<sup>118</sup> *The People (DPP) v Egan* [1989] IR 681 demonstrates the lower interaction end of the "assistance" spectrum. The defendant in this case was convicted of the robbery arising out of the theft of stolen goods, despite not being present at the commission of the robbery. The defendant was found secondarily liable for aiding and abetting the commission of the offence. He provided assistance to the principal participants of the offence by making his workshop available to hide the stolen goods (which he had agreed to do prior to the commission of the offence, and knowing the nature of the intended crime).

<sup>119</sup> *R v Bryce* [2004] EWCA Crim 1231 demonstrates the higher interaction end of "assistance" spectrum. The defendant in this case was convicted of murder, based upon his "aiding and abetting" of the primary perpetrator. The defendant provided assistance to the primary participant by driving him, along with a gun, to a caravan near the home of the victim and had arranged for the primary participant to stay there as a safe house in wait for an opportune moment to kill the victim. Some 12 hours later, the primary participant, without any further interaction with the defendant, murdered the victim. The defendant had knowledge of the primary participant's intention to commit murder.

<sup>120</sup> *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] 1 IR 593, at 616.

prosecution is not required.<sup>121</sup> The exact nature of the influence or connection between the assistance rendered and the substantive offending has been criticised for lacking certainty.<sup>122</sup>

(ii) *Abetting/Counselling*

9.115 Academic commentary suggests that there is considerable overlap between abetting and counselling.<sup>123</sup> While aiding refers to the provision of material assistance, abetting appears to refer to encouraging or inciting the commission of an offence,<sup>124</sup> while counselling covers the very similar ground of something like advising or soliciting the commission of an offence.<sup>125</sup> If there is a significant distinction between the conduct covered by abetting, and that covered by counselling, it has been suggested that abetting amounts to the provision of encouragement at the time of the commission of the offence, whereas counselling refers to encouragement that occurred prior to the offending.<sup>126</sup>

9.116 Both abetting and counselling the commission of an offence and the inchoate offence of incitement allow a defendant to be prosecuted for their encouragement of a substantive offence, and punished as a principal offender. However, abetting or counselling can be distinguished from the offence of incitement. Aiding or abetting imposes secondary liability based upon the secondary participant's culpable contribution to the actual commission of a substantive offence, whereas the offence of incitement criminalises the act of encouraging the offence, regardless of whether substantive offence actually takes place.

9.117 As was the case with aiding, abetting or counselling the commission of an offence does not require proof of a causal connection between the encouragement provided and the commission of the substantive offence to a "but for" standard.<sup>127</sup> It suffices that an act of

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<sup>121</sup> *R v Stringer* [2011] EWCA Crim 1396; *R v Mendez and Thompson* [2010] EWCA Crim 516.

<sup>122</sup> Law Commission of England and Wales, *Participating in Crime* (Law Com. No. 305 2007) at paragraph 2.33.

<sup>123</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 363; Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 284.

<sup>124</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 464; McIntyre et al, *Criminal Law* (Round Hall 2012) at 363; Charleton et al, *Criminal Law* (Butterworths 1999) at 198, define "abetting" as "to incite, instigate or encourage the commission of a crime".

<sup>125</sup> *R v Calhaem* [1985] 1 QB 808; however, in *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] 1 IR 593, at 615 the High Court (Hamilton P) stated that "counselling has also been described as "A person counsels the commission of an act if before the commission of the act he/she conspires to commit it, advises its commission or knowingly gives assistance to one who may commit it."

<sup>126</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 284; *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] 1 IR 593, at 615.

<sup>127</sup> Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 284; *R v Giannetto* [1997] 1 Cr App R 1

encouragement was communicated to the principal offender.<sup>128</sup> The encouragement need not have in fact influenced the principal offender to act.<sup>129</sup>

(iii) *Procuring*

9.118 It has been said that “[t]o procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.”<sup>130</sup> Procuring requires a greater level of interaction with the commission of the offence by the secondary participant than aiding, or abetting or counselling, as it requires that the purpose of the secondary participant’s act was to bring about the commission of the offence,<sup>131</sup> and the act did result in the commission of the offence. It is alone among the forms of conduct in requiring causation.<sup>132</sup>

(iv) *Scope of conduct*

9.119 It is apparent from the above analysis that the contributory or facilitatory conduct which the aids, abets, counsels or procures model covers, criminalises three different types of conduct. These types of conduct can be distinguished based upon the level of interaction that each type of conduct has with the substantive offending:

- (1) Encouraging the commission of substantive offence (abetting and counselling);
- (2) Assisting the commission of the substantive offence (aiding); and
- (3) Producing, by endeavour, the commission of the substantive offence (procuring).<sup>133</sup>

9.120 The least interactive level of conduct is encouragement (abetting and counselling), which allows for a very low threshold of secondary participant interaction with the substantive

<sup>128</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 363.

<sup>129</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 217.

<sup>130</sup> *Attorney-General’s Reference (No. 1 of 1975)* [1975] QB 773, at 779.

<sup>131</sup> Williams, “Finis for Novus Actus?” (1989) 48 CLJ 391, at 394; *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] 1 IR 593, at 615.

<sup>132</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 218; Ormerod and Laird note that that Glanville Williams suggested that “causation and procuring are not synonymous”.

<sup>133</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 360; Williams, “Finis for Novus Actus?” (1989) 48 CLJ 391; Campbell et al, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 287-288; Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 214; Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th ed (Bloomsbury 2016) at 213; Law Commission of England and Wales, *Report on Participating in Crime* (Law Com No 305 2007) Part 1: Introduction, at paragraph 2.21.

offence in order for secondary liability to be imposed.<sup>134</sup> It has been suggested that mere influence will be sufficient to satisfy this low threshold.<sup>135</sup> Assistance (aiding) involves a greater level of interaction in the commission of the substantive offence than mere encouragement. Procuring requires the greatest level of interaction.

9.121 The effect of the encouragement (abetting and counselling) category of conduct is to provide a relatively low bar for triggering secondary liability. Though this is a low bar, this secondary liability model does have a limit: “there is no secondary liability for a person whose participation in the relevant events does not involve him advising or encouraging [the primary participant] to commit the crime and who does not assist [the primary participant] in the commission of it in any way.”<sup>136</sup> Should the secondary participant satisfy any of these levels of interaction, this will trigger the imposition of secondary liability.

(v) *Aids, abets, counsels, or procures model; an offence in a corporate context*

9.122 A limit of the aids, abets, counsels, or procures model is that it only provides for secondary liability for omissions in limited circumstances, and the scope of these circumstances is uncertain.<sup>137</sup> The difficulty of imposing liability for omissions under this model is one of its key shortcomings in a corporate context; a derivative liability model unable to apply to such circumstances will often simply be a nonstarter.

9.123 Another difficulty with this scheme is that, even though proof of causation is only required when the procured ground is relied upon, in general, the aids, abets, counsels, or procures

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<sup>134</sup> *R v Giannetto* [1996] Crim. LR 722, in which the defendant was charged with murder, based upon his secondary participation (abetting by encouragement) in the killing of his wife by another party. In response to a jury query as to the level of involvement which the defendant was required to have with the killing in order to trigger secondary liability, the trial judge noted: “Suppose somebody came up to [the secondary participant] and said, ‘I am going to kill your wife’, if he played any part, either in encouragement, as little as patting him on the back, nodding, saying ‘Oh goody’, that would be sufficient to involve him in the murder, to make him guilty, because he is encouraging the murder.” On appeal, the English Court of Appeal agreed that “Any involvement from mere encouragement upwards would suffice”.

<sup>135</sup> Williams, “Finis for Novus Actus?” (1989) 48 CLJ 391.

<sup>136</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 214.

<sup>137</sup> Law Commission of England and Wales, Report on Participating in Crime (Law Com No 305, 2007) at 31; Ashworth, *Principles of Criminal Law* 5th ed (OUP 2006) at 45. Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 220, note that secondary liability may be imposed for omissions in limited circumstances in which law imposes a duty on an individual to act. See *Russell* [1933] VLR 59, in which a husband was found secondarily criminally liable as an accessory to homicide for standing by while his wife drowned their children. Secondary liability may be imposed for omissions where the secondary participant has a right or power to control the actions of a primary participant, but deliberately refrains from doing so, on the grounds that this inactivity may amount to positive encouragement. See *Tuck v Robson* [1970] 1 WLR 741, in which a pub licensee was found secondarily liable (aiding and abetting) in circumstances where a primary participant continued to consume intoxicating liquor on the premises after the time required for closing in the licence, and after the usual closing time. On appeal the conviction was upheld on the grounds that “the licensee was in control of his premises and had full knowledge that intoxicating liquor was being consumed after hours and, [...] there was passive assistance by the licensee in the sense of presence, with no steps having been taken by him to enforce his right either to eject the customers or to revoke their licence to be upon the premises, and, accordingly, he had been properly convicted.”

model requires that the secondary participant's act of encouragement or assistance had some connection with or influence on the commission of the crime. Proving this influence beyond a reasonable doubt may be difficult in the context of the complex structure of corporate decision-making.<sup>138</sup>

9.124 The fact that this model is not perfectly suited to the corporate offending situations is not surprising. As a generally applicable model of secondary liability, the aids, abets, counsels, or procures model is required to capture all secondary participation in offending which the criminal law seeks to prohibit. It is, therefore, a deliberately broad provision. It is not designed to take into account the distinct circumstances of the managerial corporate agent acting as secondary participant to offending in the corporate context, discussed above. Given the particular circumstances of a corporate agent exercising an influential function, it is arguable that the fact that the corporate offending has not been positively encouraged, assisted or procured by the agent is not sufficient argument to remove the agent's culpability, and should not prevent them from being held secondarily liable.<sup>139</sup>

9.125 Despite the existence of the aids, abets, counsels, or procures model, legislation targeted at corporate offending has usually chosen to include an alternative secondary liability model: the consent, connivance or neglect model (which will be considered further below).<sup>140</sup>

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<sup>138</sup> Law Commission of England and Wales, *Consultation Paper on Reforming Bribery* (CP No 185 2007) at 138. See also Smith, *A Modern Treatise on the Law of Criminal Complicity* (OUP 1991) at 19.

<sup>139</sup> The aids, abets, counsels, or procures model has been interpreted by the courts of England and Wales to equate the "passive acquiescence" of a senior managerial agent to "aiding and abetting" in *R v JF Alford Transport Ltd* [1997] 2 Cr App R 326, [1997] Crim LR 745. At first instance, the managing director of a company was convicted of aiding and abetting an employee (a driver) of the company making a false entry on the tachograph record. The director appealed against his conviction arguing that the trial judge, in summing-up, wrongly indicated to the jury that passive acquiescence was sufficient to amount to aiding and abetting. On appeal, it was held that what mattered was knowledge of the principal offence coupled with the ability to control the action of the offender and the deliberate decision to refrain from doing so; that in the present case, it would have had to have been proved that each appellant intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime, but he need not have intended that the crime be committed, so that if the management's reason for turning a blind eye was to keep the drivers happy rather than to encourage the production of false tachograph records that would afford no defence; but there being no sufficient evidence of knowledge by these appellants of the principal offence, the convictions would be quashed.

<sup>140</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (CP No 195 2010) at 140: "statutes creating offences commonly provide for a slightly wider basis on which directors can be found individually liable for offences committed by their company. Such statutes provide that directors can be individually liable if they 'consent or connive' at the commission of the offence by the company [...] consent and connivance provisions ensure that individual directors who are fully aware of, and approve of (or, for example, sign papers consenting to) criminal wrongdoing can themselves be convicted of the crime, even though their approval or consent does not as such encourage or assist the commission of the crime committed, assisted or instigated by other directors or equivalent persons."; Law Commission of England and Wales, *Reforming Bribery A Consultation Paper* (CP No 185 2007) at 137.

**(c) Scope of participants to be subject to liability**

9.126 The aids, abets, counsels or procures model is the sole generally applicable secondary liability mechanism in Irish criminal law. The scope of participants is therefore as wide as the scope of participation in any substantive criminal offence in Irish law. In this way it differs from the consent, connivance or neglect model, and the officer in default models considered below, which are qualified in their application.

**(d) Burden shifting provision**

9.127 The aids, abets, counsels or procures model does not contain a burden shifting provision. Again, in this way, this model differs from the consent, connivance or neglect model, and the officer in default (*Companies Act 2014*) model considered below.

**2. Consent, Connivance or Neglect****(a) Introduction**

9.128 Secondary criminal liability of corporate agents, derived from offences committed by a corporate body, is currently provided for throughout Irish legislation using two main models. The most common formulation provides that certain individual officers (generally a director, manager or comparable officer of a corporate body) can be held secondarily liable for a criminal offence committed by a corporate body, where that offence has been authorised, consented to, or is attributable to connivance or neglect (or wilful neglect) on the part of that officer.

9.129 Variations on this type of liability provision are contained in the legislation dealing with regulatory and corporate offending, such as competition, safety and health at work, and theft and fraud legislation:

Section 8(6) of the *Competition Act 2002* provides for the attribution of liability to an individual person for the offence of an undertaking, where the offending act was authorised or consented to by the relevant individual;<sup>141</sup>

Section 9(1) of the *Waste Management Act 1996* provides for liability to be attributed to a relevant individual for the offence of a corporate body, where that offending was committed with the consent or connivance of, or is attributable to any neglect on the part of, that individual;<sup>142</sup>

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<sup>141</sup> That person being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity.

<sup>142</sup> That person being a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity



Section 22 of the *Criminal Justice Act 2011* provides that where an offence under that Act (primarily corporate offences) is committed by a body corporate and it is proved that the offence was committed with the consent or connivance, or was attributable to any wilful neglect, of a relevant person,<sup>143</sup> that person as well as the body corporate, shall be guilty of an offence;

Section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* provides that if an offence of a body corporate under the act is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of a person,<sup>144</sup> that person as well as the body corporate is guilty of an offence;

Section 80(1) of the *Safety, Health and Welfare at Work Act 2005* provides that where the offence of an undertaking, under the act, has been authorised, or consented to by, or is attributable to connivance or neglect on the part of, a defined person,<sup>145</sup> that person as well as the undertaking shall be guilty of an offence.<sup>146</sup>

Regulation 61(11) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014) provides that where an offence under the Regulation is committed by an institution, with the consent or connivance of, or is attributable to any wilful neglect by, a defined person,<sup>147</sup> that person is taken to have committed an offence and may be proceeded against and punished in accordance with regulation 61(12).

Section 1078(5) of the *Taxes Consolidation Act 1997* provides that where the offence under this section is shown to have been committed by a body corporate with the consent or connivance of, or to be attributable to any recklessness on the part of, a defined

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<sup>143</sup> That person being a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity.

<sup>144</sup> That person being a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity.

<sup>145</sup> That person being a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity.

<sup>146</sup> Section 80(2) of the 2005 Act provides that in respect of a person employed by an undertaking whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised, consented to or attributable to connivance or neglect on the part of that person.

<sup>147</sup> Regulation 61(11) provides that at the time when the offence is committed, such person is (a) a director, manager, secretary or other officer of the authorised credit institution or a person purporting to act in that capacity, or (b) a member of the committee of management or other controlling authority of the institution or a person purporting to act in that capacity.

person,<sup>148</sup> that person shall also be deemed to be guilty of the offence.

9.130 The second model of derived liability is that found in *Companies Act 2014* (discussed further below), which provides an alternative “officer in default” approach for imposing criminal liability on an individual. This formulation is not seen in any other legislation in this jurisdiction.<sup>149</sup>

**(b) Formulation of consent, connivance or neglect provisions**

9.131 Typically, a statutory provision permitting an individual within a corporate body to be considered criminally liable for the conduct of the corporate body reads as follows:

Where –

(a) an offence under this Act has been committed by a corporate body, and

(b) the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect [alternatively, any wilful neglect] on the part of a person who was either:

i. a director, manager, secretary or other officer of the body corporate, or

ii. a person purporting to act in any such capacity,

that person, as well as the corporate body, is guilty of an offence and is liable to be proceeded against and punished as if he or she were guilty of the offence committed by the corporate body.

9.132 Unlike the aids, abets, counsels or procures model, this model adopts three different fault and conduct requirements, which allows for broader imposition of liability and better reflects the nature of a managerial agent’s function in the corporate body. This model also provides for a functions-based test for which persons can attract liability under this model (which will be discussed further below), and often includes a reverse burden provision (which will also be considered below).

9.133 Under this model the imposition of secondary liability to a corporate agent (who satisfy the functions test) may be triggered where that agent:

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<sup>148</sup> That person being, when the offence was committed, a manager, secretary or other officer of the body corporate, or a member of the committee of management or other controlling authority of the body corporate.

<sup>149</sup> Ahern, *Directors’ Duties* (Roundhall 2009) at 327, describes how the “officer in default” provision in Irish legislation was first introduced in section 383 of the *Companies Act 1963*.

- (1) consented to the offence committed by the corporate body,
- (2) connived in the offence committed by the corporate body, or
- (3) engaged in wilful neglect (in some provisions) or any neglect (in other provisions) so that the offence committed by the corporate body may be attributed to this.<sup>150</sup>

9.134 Rather than providing for the requisite criminal fault and conduct through separate descriptors, each of these liability triggers describes both the level of culpability and type of conduct required in order to accrue secondary liability in one word or phrase. The scope of each of these liability triggers shall now be considered. For the purposes of this analysis, the fault and conduct required by each trigger will be considered separately under different headings, and under each heading, each trigger shall be considered in turn.

### **(c) Participant's fault**

#### *(i) Consent*

9.135 For a person to be made criminally liable based on consent, there must be proof that he or she knew about the prospective actions of the corporate body. A person cannot consent to something without first knowing about it.<sup>151</sup> This liability trigger therefore caters for circumstances in which agents contribute to or facilitate the corporate body's commission of an offence with the culpability of the highest degree recognised by the criminal law: knowledge. An individual consents to the commission of an offence when he or she is aware of what is going on, and agrees to it.<sup>152</sup> The level of knowledge required when consent is relied upon is that the defendant knew of the material facts that constituted the offence, and agreed to the conduct of the business based on those facts.<sup>153</sup>

#### *(ii) Connivance*

9.136 As is the case with consent, a person can be made criminally liable based on connivance where there is proof that he or she knew about the prospective substantive offending of the corporate body. Connivance is broader than consent, however. While an individual who connives may be equally aware of the corporate offending as an individual who consents,<sup>154</sup> connivance may also be made out where an individual is wilfully blind to a

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<sup>150</sup> As can be seen in Table 9.1, different statute specific versions of this model are not uniform in the formulation of their provisions. Aside from the different uses of "any neglect" and "wilful neglect" Section 8(6) of the *Competition Act 2002* uses the terms "authorised or consented to" and section 1078 of the *Taxes Consolidation Act 1997*, as amended, uses the term "any recklessness".

<sup>151</sup> *Re Caughey* (1875–76) LR 1 Ch D 521, 528.

<sup>152</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at 191.

<sup>153</sup> *Re AG's Reference (No 1 of 1995)* [1996] 1 WLR 970.

<sup>154</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at 191.

course of action or state of affairs.<sup>155</sup> It may also occur through reckless conduct by knowing that there is a risk of offending but doing nothing about it.<sup>156</sup>

9.137 Connivance therefore allows for corporate agents who have demonstrated either the highest level of culpability recognised by the criminal law (knowledge) or the lower forms of subjective fault (recklessness or wilful blindness) to attract secondary liability for their contribution to, or facilitation of, corporate offending.

(iii) *Attributable to wilful neglect*

9.138 The phrase attributable to wilful neglect applies to omissions by an officer who knows or is reckless as to the fact that the consequences of his or her inaction will be the commission of an offence by the corporate body. The phrase “wilfully” requires an understanding of the consequences of one’s actions in deliberately neglecting to do something that should have been done.<sup>157</sup> It requires knowledge that something or some requirement is being neglected.<sup>158</sup> Wilful neglect differs from neglect of a duty without the descriptor “wilful” (discussed below), which does not require awareness. The inclusion of wilful neglect does not add much to consent or connivance because it is similar to connivance regarding the levels of culpability it covers.<sup>159</sup>

9.139 Like connivance, attributable to wilful neglect allows an agent to be held criminally liable for his or her failure to act due to a conscious disregard of risk. Again, this covers the second level of subjective fault considered in the culpability hierarchy: recklessness or wilful blindness.

(iv) *Attributable to any neglect*

9.140 Attributable to any neglect<sup>160</sup> differs in a significant respect from attributable to wilful neglect because a corporate agent can be held secondarily criminally liable where he or she failed to carry out a duty but had no actual knowledge of (did not consent to or connive at) the offence committed by the corporate body. Thus, “any neglect” involves an objective test that an accused has fallen below an identifiable standard of action.

9.141 Where the trigger of any neglect is applied, a corporate agent will be taken, because of the surrounding circumstances, to have constructive knowledge of the risks of corporate offending. Once placed on inquiry regarding such risks, he or she will be under a duty to

<sup>155</sup> *Manning v Manning* [1950] 1 All ER 602

<sup>156</sup> Law Commission of England and Wales, *Reforming Bribery* (CP No.185 2007) at 137.

<sup>157</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 12th ed (OUP 2011) at 161-162.

<sup>158</sup> Law Commission of England and Wales, *Criminal Liability in Regulatory Contexts: Responses to Consultation Paper*, at 248, paragraph 1.1338.

<sup>159</sup> *R v P Ltd and G* [2007] EWCA Crim 1937, [2008] ICR 96, at paragraph 12.

<sup>160</sup> Some consent, connivance and neglect provisions use the term “any neglect”, while others use merely “neglect”. These two terms are synonymous.

take steps to determine whether the appropriate procedures to prevent the corporate body's offending were in place.<sup>161</sup> As with wilful neglect, the commission of an offence by the corporate body must be attributable to (caused by) the neglectful failure of the agent to take these reasonable steps.<sup>162</sup>

9.142 The objective nature of the any neglect liability trigger results in the potential for more broadly applicable criminal liability than if the test were confined to consent, connivance or attributable to wilful neglect. This trigger caters for circumstances in which the corporate agent may not have demonstrated subjective culpability in his or her contribution to, or facilitation of, the corporate offending. All that is required is that the agent met the objective culpability standard of simple negligence. The use of the any neglect trigger for liability thus considerably widens the application of secondary liability beyond the aids, abets, counsels or procures model.

9.143 Submissions made to the Commission's Issues Paper provided support for the view that it is inappropriate, except in strict liability offences, that mere neglect should give rise to the criminal liability of an individual.

(v) *Disparity of culpability*

9.144 As noted above, and discussed in the Issues Paper for this Report,<sup>163</sup> it is arguable that the choice of whether to include either wilful neglect or any neglect in a legislative provision should correspond to the level of fault required to be proved in the substantive corporate offence. However, the Issues Paper outlined examples of consent, connivance and neglect provisions where this is not the case.<sup>164</sup>

9.145 Section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* provides an example of this model of liability providing for a disparity of culpability. It allows a director or officer of a corporate body to be held secondarily liable (for an offence committed by the corporate body under the 2001 Act) if it can be proved to be attributable to any neglect on that officer's part. The 2001 Act contains several fraud based offences<sup>165</sup> (discussed in detail in Chapter 11, below) that require proof of knowledge or intention of an accused (subjective fault requirements), to which section 58(1) can be applied. As a result, a corporate officer can be found secondarily criminally liable for a subjective-fault

<sup>161</sup> *R v P Ltd* [2007] EWCA Crim 1937, at paragraph 13.

<sup>162</sup> UK Criminal Bar Association and Bar Council Submission to the Law Commission of England and Wales, see the Law Commission of England and Wales, *Criminal Liability in Regulatory Contexts Responses*, at paragraphs 1.1329 to 1.1349.

<sup>163</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LRC IP 8-2016), at Issue 8.

<sup>164</sup> *Ibid.* at paragraphs 8.13-8.14.

<sup>165</sup> For example, section 6 of the 2001 Act (making a gain or causing a loss by deception) section 7 of the 2001 Act (obtaining services by deception) and section 9 of the 2001 Act (unlawful use of a computer).

based offence committed by a corporate body based on an objective fault (neglect of duty) standard.

9.146 The example provided in section 58 of the 2001 Act can be contrasted with the consent, connivance or neglect type provision found in section 22 of the *Criminal Justice Act 2011*. All of the liability triggers provided by this section are subjective fault requirements (this is a wilful neglect form of this model). Like section 58 of the 2001 Act, section 22 also fails to track the type of culpability required by a number of offences in the 2011 Act. This includes an offence of without reasonable excuse (an objective fault requirement) failing or refusing to comply with an order.<sup>166</sup> The interaction of section 22 and an objective fault based offence results in a disparity in culpability between the principal offender (objective fault) and secondary participant (subjective fault) to this offence, a form of disparity that has been criticised above.

9.147 Consent requires that the prosecuting entity prove that the secondary participant acted with the highest level of criminal culpability: knowledge or intent.<sup>167</sup> However, based on the general formulation of consent, connivance and neglect provisions, a disparity of culpability can still occur where a secondary participant consents to the commission of a substantive offence with a lower culpability requirement – for example recklessness.

9.148 Section 21 of the *Criminal Justice Act 2011* provides, among other things, that an employee shall be guilty of an offence if he or she makes a disclosure under the 2011 Act, being reckless as to whether that disclosure is false. Section 22 of the 2011 Act provides that a secondary participant to this offence can be held liable for that offence, where the offence was committed with the consent of that participant (subject to that participant satisfying a functions based test).

9.149 Under section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* an officer of a corporate body may be held secondarily liable for the offence of making a gain or causing a loss by deception by reason of having connived in the commission of an offence. Liability will be imposed where the officer was aware of a risk of offending on the part of an agent of the corporate body, but chose to ignore that risk and does nothing about it,<sup>168</sup> regardless of whether that omission causatively resulted in the commission of the offence.

9.150 As will be discussed below, the wrongful conduct of the officer is not comparable to that of the primary perpetrator of the offence, and there is also a disparity in the level of subjective culpability between the principal offender and secondary participant. The primary perpetrator must have “acted dishonestly” with the “intention of making a gain for himself or herself or another, or of causing loss to another”. The subjective culpability

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<sup>166</sup> Section 15(15) of the *Criminal Justice Act 2011*.

<sup>167</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at 191.

<sup>168</sup> *Manning v Manning* [1950] 1 All ER 602.

of the secondary participant need only be “wilfully blind” or subjectively disregard the risk of the primary perpetrator’s offending – a lower level of culpability.

9.151 As discussed above, holding a secondary participant liable as a principal offender, based upon a lower level of culpability than is required of a principal offender is worthy of criticism.

(vi) *Unfair labelling*

9.152 Consent, connivance or neglect provisions, as they are currently formulated, present a risk of unfairly labelling a successfully prosecuted secondary participant.

9.153 Under section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001* an officer of a corporate body may be held secondarily liable for the offence of making a gain or causing a loss by deception (under section 6 of the 2001 Act), if the offence is attributable to any neglect on the part of the officer. This can occur where the officer, having been placed on inquiry by the surrounding circumstances, fails to take reasonable steps to ensure appropriate procedures are in place to prevent the relevant offending, and that offending occurs.<sup>169</sup>

9.154 Compare the above conduct to the required wrongful conduct of the primary participant who must “dishonestly, [...] by any deception induce another to do or refrain from doing an act”. The conduct element of secondary liability under section 58 is not comparable to the conduct element of the substantive offence. Despite this, upon conviction the secondary participant will be subject to the same stigma and moral opprobrium as the primary perpetrator, of having been convicted of a fraud offence. The secondary participant will also be subject to the same maximum sentence, on indictment, as the primary perpetrator of the offence: “a fine or imprisonment for a term not exceeding 5 years or both”.<sup>170</sup>

9.155 It is the nature of secondary liability models that a successfully prosecuted secondary participant will be labelled, and subjected to the same potential punishment, as the primary participant (it is a derivative liability provision). As discussed in the disparity of culpability section above, current consent, connivance or neglect provisions do not require that the culpability of the secondary participant track that of the primary participant. Additionally, however, the conduct required of the secondary participant will never be identical to the conduct element of the substantive offence, when a consent, connivance or neglect provision allows for a secondary participant to be labelled like the principal offender. This will result in a contravention to the principle of fair labelling, despite there

<sup>169</sup> *R v P Ltd and G* [2007] EWCA Crim 1937, at paragraph 13

<sup>170</sup> The primary participant will be acting with the “intention of making a gain for himself or herself or another, or of causing loss to another” (the subjective fault element of the offence).

being a distinction in the participant's conduct and culpability to that required by the substantive offence..

(vii) *Conclusion*

9.156 The benefit of the fault requirements of the consent, connivance or neglect model of liability, is that it covers a far greater scope of culpability than, for example, the aids, abets, counsels or procures model, with the any neglect form of this model covering both the subjective and objective types of fault found on the culpability hierarchy considered above. This model, therefore, does not allow for corporate agents who have culpably contributed to, or facilitated, the offending of the corporate body to go unpunished, merely because they have not demonstrated the highest level of culpability acknowledged by the criminal law: intention or knowledge.

9.157 The consent, connivance and neglect model is intended to be "wider" in its application than the generally applicable aids, abets, counsels, or procures model.<sup>171</sup> The consent, connivance and neglect model is essentially "another strand" of the doctrine of secondary liability, formulated to be a "sensible"<sup>172</sup> expansion of the doctrine that caters for the special nature of the relationship between a senior managerial agent and the offending corporate body.

9.158 Despite this benefit, examples of the consent, connivance and neglect model demonstrate that this model fails to ensure that the fault required of the secondary participant tracks that required of the principal offender. This has resulted in it attracting disparity of culpability and unfair labelling criticisms.

**(d) Participant's conduct**

(i) *Consent*

9.159 As noted above, in order for an agent to consent to something, he or she must knowingly agree to it.<sup>173</sup> In order to satisfy the conduct requirement of consent for the purpose of this model, the agent must do something more than merely acquiesce. A positive act of agreement is required. However, consent can be established by inference as well as by proof of an express agreement.<sup>174</sup>

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<sup>171</sup> Law Commission of England and Wales, Consultation Paper on Criminal Liability in Regulatory Contexts (CP No 195 2010) at 140; Law Commission of England and Wales, *Reforming Bribery A Consultation Paper* (CP No 185 2007) at 137.

<sup>172</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 94-95.

<sup>173</sup> *Huckerby v Elliott* [1970] 1 All ER 189, at 191.

<sup>174</sup> *R v Chagot Ltd, Ruttle Contracting Ltd and Ruttle* [2008] UKHL 73, [2009] 2 All ER 645; *Bell v Alfred Frank & Bartlett Co Ltd* [1980] 1 WLR 340.



(ii) *Connivance*

9.160 Connivance is tacit agreement to the commission of the offence. Unlike consent, connivance can arise in circumstances in which the managerial agent acquiesces to the commission of the offence.<sup>175</sup> The inclusion of connivance in this model is one of the features that “widen” its scope of application beyond the aids, abets, counsels or procures model. A corporate agent will be able to connive at the commission of the offence without needing to positively act: the agent need only either know about the prospective offending or be aware of the risk of the offending and do nothing to prevent it.<sup>176</sup> Connivance therefore allows liability to be imposed based upon a culpable omission.

(iii) *Attributable to wilful neglect*

9.161 As can be seen from the general format of this type of provision, outlined above, this model generally requires that the commission of the offence by the corporate body can be attributable to wilful neglect by the corporate agent. The inclusion of wilful neglect is similar to connivance in terms of the scope of conduct it covers.<sup>177</sup> However, should the prosecuting entity choose to prove wilful neglect rather than relying on connivance, it will have to prove the additional requirement of causation. Wilful neglect, therefore, allows for the imposition of secondary liability based on the omission of the secondary participant. In this manner, wilful neglect provisions continue to “widen” the circumstances in which secondary liability can be applied to a corporate agent beyond that which is provided by the generally applicable aids, abets, counsels or procures model of liability.

(iv) *Attributable to any neglect*

9.162 This liability trigger covers the same scope of conduct as attributable to wilful neglect.

(v) *Conclusion*

9.163 Consent, connivance or neglect provisions cover a wide range of behaviour through which a corporate agent may contribute to, or facilitate corporate offending. This conduct ranges from positive acts of agreeing to the commission of an offence, to tacit agreement through the agent’s acquiescence, and even any unreasonable (in the case of any neglect provisions) or knowingly risky (in the case of wilful neglect provisions) omissions on the part of the agent, which result in the commission of the corporate offence.

9.164 This model better caters for a corporate managerial agent’s contribution to, or facilitation of corporate offending, by allowing such agents to be held accountable for the

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<sup>175</sup> *Boulting v Boulting* (1863) 3 Sw & Tr 329, at 335.

<sup>176</sup> Law Commission of England and Wales, *Reforming Bribery* (CP No.185 2007) at 137.

<sup>177</sup> *R v P Ltd* [2007] EWCA Crim 1937, at paragraph 12.

wrongdoings of the corporate bodies over which they wield some control.<sup>178</sup> This is, in part, done by this model's expressly taking account of such agent's culpable omissions, rather than positive act, in a way which the generally applicable aids, abets, counsels or procures model does not (or will only do as a matter of exception, rather than rule, in an uncertain manner).

**(e) Scope of participants to be subject to liability**

9.165 A functions-based test for determining which corporate officers may be subject to liability is central to the consent, connivance or neglect model of derivative officer liability. Including this test as a gateway to liability justifies the imposition of liability to an agent in "wider" circumstances than would be provided for by the general criminal law. Liability is justified by the special nature of the position held by a managerial agent who operates with decision-making power, authority, and control over the actions of a corporate body, its employees and agents. These agents are "those without whose involvement the offending conduct could not be endorsed or approved."<sup>179</sup> An agent who satisfies the functions-based test will have acted in a particularly culpable manner when he or she has failed to exercise these powers of control properly, permitting or failing to prevent the corporate offending.

9.166 The functions-based test generally utilised in consent, connivance or neglect provisions is altered somewhat between specific provisions. It is sometimes altered depending on the specific category of person which the offence or legislation to which the secondary liability provision seeks to target.

Examples of functions-based tests in consent, connivance or neglect provision

Section 8(6) of the *Competition Act 2002*:-

"a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity".

Section 9(1) of the *Waste Management Act 1996*:-

"a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity".

Section 22 of the *Criminal Justice Act 2011*:-

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<sup>178</sup> Wright, "Criminal liability of directors and senior managers for deaths at work" [2007] Crim LR 949, at 951 and 957.

<sup>179</sup> *The People (DPP) v Hegarty* [2011] IESC 32, [2011] 4 IR 635, at 644.

“a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity”.

Section 58(1) of the *Criminal Justice (Theft and Fraud) Offences Act 2001*:-

“a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity”.

Section 80(1) of the *Safety, Health and Welfare at Work Act 2005*:-

“a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity”.

Section. 80(2) provides a separate functions based test outlining a distinct category of persons to whom a reverse burden provision applies:-

“a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity”.

Regulation 61(11) of the *European Union (Capital Requirements) Regulations 2014* (S.I. No. 158 of 2014):-

“a director, manager, secretary or other officer of the authorised credit institution or a person purporting to act in that capacity, or a member of the committee of management or other controlling authority of the institution or a person purporting to act in that capacity”.

Section 1078(5) of the *Taxes Consolidation Act 1997*:-

“a director, manager, secretary or other officer of the body corporate, or a member of the committee of management or other controlling authority of the body corporate”.

9.167 The director, manager, or other similar officer functions-based test provided in currently enacted consent, connivance or neglect models expressly identifies the natural persons to whom liability can be attached. As can be seen above, it is often formulated to include descriptors such as: directors, managers, secretaries or other officers of an undertaking (or other similar/specified officer), or persons purporting to act in such a capacity.<sup>180</sup>

<sup>180</sup> See, for example, section 8(6) of the *Competition Act 2002*; section 22 of the *Criminal Justice Act 2011*; section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*; or Regulation 61(11) of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014).

Largely, however, each version of a consent, connivance or neglect provision provides that liability can be imposed on something like a manager or other similar officer.

9.168 A functions based test targeting “directors, managers, or other similar officers” was discussed in the *People (DPP) v Hegarty*<sup>181</sup> (a prosecution of a director under the *Competition Act*), in which the Supreme Court held:

“As natural persons are directly instrumental in the actions of a body corporate, the [authorise or consent to provision in the Competition Act 2002] also created offences against certain influential position holders within a company, being essentially those without whose involvement the offending conduct could not be endorsed or approved. Culpability in this regard was confined to persons with a high level of responsibility for decision making i.e. directors, managers, other similar officers, and those who hold themselves out as such. The result was that, arising out of the same set of circumstances, any one of such persons, if not an undertaking in his/her own right, as well as an undertaking so defined, could each be guilty of a criminal offence. [ . . .] If the Act criminalised one player but not the other, responsibility by way of effective sanction and deterrence could be skilfully and freely avoided, or at least substantially diminished, by any number of expedient devices, such as, in the case of a body corporate, liquidation, and in the case of an individual being, impecuniosity. That [ . . .] would have made enforcement arduous and it would have made avoidance affordable and undemanding. Therefore, in principle, there is nothing surprising in the concept of both non-personal undertakings and their managers/officers and like persons, being exposed to criminal prosecution arising out of the same abusive conduct. Such persons are separate and distinct legal personalities and therefore no question of double punishment arises.”

9.169 The objective of this functions based test is to allow liability to be attached to persons with a high level of responsibility for decision-making, where misuse of that responsibility endorses or approves of corporate criminality. Targeting a “director, manager or other similar officer” allows for a broad application of the provision.

9.170 Although terms such as “director” and “secretary” clearly refer to specific types of senior officer within the corporate body, the inclusion of “manager or other similar officer” has

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<sup>181</sup> *The People (DPP) v Hegarty* [2011] IESC 32, [2011] 4 IR 635, at 644.

been interpreted by the courts as including persons with policymaking or executive roles.<sup>182</sup>

9.171 The broad nature of “manager or other similar officer” can be criticised for failing to include further guidance as what amounts to “similar officer”. How far down the chain of command of a corporate body can a “similar officer” be found? Does liability extend beyond senior management, to include functions that might be describable as middle management?<sup>183</sup>

9.172 This uncertainty in the functions-based test of consent, connivance or neglect provisions has resulted in case law stepping in to clarify the persons that can be subject to liability. These cases indicate that formal titles are not determinative of whether a person satisfies the test. Rather, it is the function of the corporate officer, rather than his or her title, that is determinative. As noted in the Issues Paper of this Report: substance rather than form should prevail.

9.173 The level and type of responsibility required of a person to satisfy this test was considered by the Court of Appeal in *The People (DPP) v TN*.<sup>184</sup> This decision related to an interpretation of the managerial functions test provided in section 9(1) of the *Waste Management Act 1996*. However, the Court expressly noted that its interpretation was applicable to other examples of this type of provision.<sup>185</sup> The Court recognised that it is possible (in light of the structure of modern companies) that no single person will bear responsibility for the management of the whole of the affairs of a company. These responsibilities may necessarily be distributed across different individuals. For this reason, the Court acknowledged that the managerial functions test does not require a person to be “in charge of the company as a whole”; rather, all that is required is that the person holds “significant” responsibility (ie, they are entrusted with important areas of responsibility). The Court of Appeal gave two illustrative examples of when the circumstances in question may indicate that a person’s responsibility is significant:

- (1) In general, the responsibilities of a manager of a bank branch may not be “significant” in relation to the bank as a whole. However, in circumstances where

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<sup>182</sup> Byrne, *Safety and Health Acts: Annotated and Consolidated* (Roundhall 2013) at 197, in relation to the consent, connivance or neglect provision contained in section 80 of the *Safety, Health and Welfare at Work Act 2005*, summarises the officers identified by the functions-based test as “includes the equivalent of the management board and other persons who control the affairs and property of the organisation.”; See also Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26 - 2003) at paragraph 2.57.

<sup>183</sup> Foster, *Workplace Health and Safety Law in Australia* (Lexis Nexis 2016) at 418, noted similar criticism regarding section 26 of the *Australian Occupational Health and Safety Act 2000* which provided for liability to be imposed on persons “concerned in management”, a similarly vague phrase.

<sup>184</sup> *The People (DPP) v TN* [2018] IECA 52.

<sup>185</sup> *The People (DPP) v TN* [2018] IECA 52, at paragraph 26.

the bank only has “one place of business or a very small number of places of business”, a branch manager’s responsibilities may, in fact be “significant”; and

- (2) The areas of responsibility which a “safety manager” will have over the functioning of an undertaking may be very limited indeed. However, with respect to the responsibilities placed on such a function holder by health and safety legislation, and entrusted to the individual in question by an undertaking, this area of responsibility is “very important”, and so is “significant” for the purposes of a managerial functions test.

9.174 As such, it appears that what may amount to a “significant” responsibility, for the purpose of the managerial functions test, will depend on both the circumstances of the corporate body or undertaking in question, and/or the nature of the responsibility in question, and how it relates to the offending at hand.

9.175 The court also provided, however, that even where a person is found to have “significant” responsibility, he or she should only accrue liability where the area of offending in question falls within his or her responsibility. In applying the managerial functions test provided in section 9(1) of the 1996 Act, the Court of Appeal laid down a two-step test:

- (1) did the defendant have functional responsibility for a significant part of the company’s activities; and
- (2) did the defendant have direct responsibility for the area in controversy.<sup>186</sup>

9.176 This two step-test test facilitates the purpose of the managerial functions test, noted above, to target individuals who had a high level of responsibility over the affairs of an undertaking, and misuse that responsibility.

9.177 This analysis echoes earlier applications of the managerial functions test. *Armour v Skeen*<sup>187</sup> involved a prosecution under health and safety legislation. The defendant had been convicted under a consent, connivance or any neglect provision before the Scottish High Court of Justiciary. The defendant was the manager of the roads division of a regional authority. A number of the employees fell under his supervision and management, one of whom fell while painting a bridge and died. The Council did not have a safety policy regarding this task, as required by legislation. However, the Council had issued instructions to department heads requiring the preparation of safety policies, which instruction the defendant had not complied with by the time of the incident. The defendant’s conviction was upheld on appeal. In its finding, the Scottish High Court placed emphasis on the defendant’s role of responsibility over the Roads Division, and how the division functionally operated: “bearing in mind his position as Director of Roads, it was

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<sup>186</sup> *The People (DPP) v TN* [2018] IECA 52, paragraph 27.

<sup>187</sup> *Armour v Skeen* [1977] IRLR 310.

Mr Armour's personal responsibility to have formulated the safety policy for his department."<sup>188</sup>

9.178 The scope of persons who fall under this test was further clarified by the English Court of Appeal in *R v Boal*.<sup>189</sup> As in *Armour*, the defendant in *Boal* held a title that appeared to suggest that he was an "influential position holder" within the corporate body. The defendant held the title of "assistant manager" in a large London bookshop, Foyles Ltd. An inspection of the shop premises by the fire authority found that emergency exits were blocked, and the company was prosecuted for an offence under fire safety legislation. The defendant had been present in the shop on the day of the inspection and was prosecuted as a "director, manager or other similar officer" of the company under a consent, connivance or neglect provision. The defendant argued that, although his title was "assistant manager", he in fact had no policymaking or executive role in the company, and that he had merely a supervisory role. The English Court of Appeal agreed with this analysis and held that, although the defendant's title contained the word "manager", it was his actual function rather than his title that was relevant. On this basis, even though he was in charge of the day-to-day operation of the shop on the day in question, the Court held that he did not fall within the scope of the term "director, manager or other similar officer" in the fire safety legislation because he had no role in preparing the company's fire safety policy.

9.179 A similar decision was made by the Court in *Woodhouse v Walsall Metropolitan Borough Council*,<sup>190</sup> in which the court confirmed that a person who was not "a decision-maker within the company having both power and responsibility to decide corporate policy and strategy", did not fall within the scope of this test.

9.180 The delegation of operational functions by the corporate body to a corporate officer is a fundamental necessity for any corporate body to operate.<sup>191</sup> The findings in *TN*, *Armour*, *Boal* and *Woodhouse* clearly demonstrate that it is the identification of these delegated functions (the control and authority that the defendant officer wields over the corporate body), and the manner in which those functions are used in the context of the corporate body's offending, that dictates whether criminal liability can be imposed. The fact that a defendant is described as a director, manager or other similar type of officer is irrelevant unless he or she can also be shown to have operated the delegated powers of control and authority generally delegated to such an officer.

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<sup>188</sup> Byrne, *Safety and Health Acts: Annotated and Consolidated* (Roundhall 2013) at 197.

<sup>189</sup> *R v Boal* [1992] QB 591.

<sup>190</sup> *Woodhouse v Walsall Metropolitan Borough Council* [1994] Env LR 30.

<sup>191</sup> Byrne, *Safety and Health Acts: Annotated and Consolidated* (Round Hall 2013) at 201.

**(f) Burden shifting provision**

9.181 It has become increasingly common for provisions that provide for the derivative criminal liability of a “director, manager or other similar officer” to include an additional element to the effect that those with policy-making functions in the corporate body can be “presumed” to have authorised, consented to or, as the case may be, neglected to do something that can be attributed to the offence by the corporate body. For example:

Section 80(2) of the *Safety, Health and Welfare at Work Act 2005* provides that where a person is proceeded against as aforesaid for such an offence and it is proved that, at the material time, he or she was:

a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking,

or a person who purported to act in any such capacity,

it shall be presumed, until the contrary is proved, that the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised, consented to or attributable to connivance or neglect on the part of that person.

9.182 This burden shifting provision can be broken into two parts: first, how the presumption is engaged; and what must be demonstrated to rebut the presumption.

*(i) Engaging the rebuttable presumption*

9.183 The means by which the recommended scheme’s reverse burden provision will be engaged will be modelled on the reverse burden provision found in section 80(2) of the *Safety, Health and Welfare at Work Act 2005*. As such, the presumption shall be engaged where the prosecution can demonstrate that the managerial agent was a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by it whose duties included making decisions that could have affected the management of the body, or a person who purported to act in any such capacity.

9.184 The effect of this element of section 80(2) is that the defendant will successfully rebut the presumption where he or she can provide some evidence which undermines either the fault or conduct element of the consent, connivance or neglect model provided in section 80(1). In mirroring the means of rebutting the presumption in section 80, the Commission considers that any general scheme should apply where: the managerial agent can demonstrate that he or she does not satisfy either the fault requirement that would be placed upon the prosecuting entity (were the presumption not being relied upon), or; the aspect of the conduct element of the scheme which relates to the agent’s contribution to the substantive offence.



*(ii) Rebutting the presumption*

9.185 To rebut the presumption, the consent, connivance or neglect model requires the defendant to prove (to the standard of the evidential burden) either:

- (1) that he or she did not authorise or permit the commission of the substantive offence, or
- (2) that the offence is not attributable to connivance or neglect on his or her part.

9.186 The effect of this element of section 80(2) is that the defendant will successfully rebut the presumption where he or she can provide some evidence which undermines either the fault or conduct element of the consent, connivance or neglect model provided in section 80(1).

9.187 Where the substantive offence is a strict or absolute liability offence, the obligation placed upon the agent to rebut the presumption will be confined to providing evidence that undermines the case that the agent, through his or her conduct, contributed to the substantive offending.

9.188 As the reverse burden provision does not include a presumption that the substantive offence has taken place, there is no need to provide evidence against this offence (whether fault based, or strict or absolute liability in nature) in order to rebut the presumption.

### **3. Officer in Default**

9.189 The *Companies Act 2014* contains another model of derivative criminal liability that is specifically aimed at individual officer liability - the officer in default model. This model is set out in two sections of the 2014 Act, and provides that:

*Section 270 of the Companies Act 2014*

For the purposes of any provision of this Act which provides that an officer of a company who is in default shall be guilty of an offence, an officer who is in default is any officer who authorises or who, in breach of his or her duty as such officer, permits the default mentioned in the provision.

In this section “default” includes a refusal to do a thing or a contravention of a provision.

*Section 271 of the Companies Act 2014*

In this section—

“basic facts concerning the default” means such of the facts, relating to the one or more acts or omissions that constituted the default, as can reasonably be regarded as indicating, at

the relevant time, the general character of those acts or omissions,

“permitted”, in relation to the default, means permitted in breach of the defendant’s duty as an officer of the company concerned,

“relevant proceedings” means proceedings for an offence under a provision of this Act, being a provision which provides that an officer of a company who is in default shall be guilty of an offence,

a reference to a defendant in those proceedings is a reference to—

the defendant, or

if there is more than one defendant, each of the one or more persons, other than the company, alleged to be in default,

being, in every case, a person who was an officer of the company at the relevant time.

In relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default unless the defendant shows that he or she took all reasonable steps to prevent it or that, by reason of circumstances beyond the defendant’s control, was unable to do so.

9.190 The officer in default provisions allow for the imposition of criminal liability for offences under the 2014 Act on company officers.<sup>192</sup> This model is used to reach similar goals as the consent, connivance, or neglect model. First, this is to provide for personal sanctions that act as a deterrent for persons with an influential role in a corporate body who might contemplate, or disregard a known risk of, acting illegally through the corporate body, or might fall below a reasonable objective standard of behaviour in fulfilling their obligations thereby causing or contributing to the corporate body to acting illegally. Second, this is to ensure that the deterrent effect provided by imposing liability on the corporate body is

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<sup>192</sup> Company officers may also be held directly liable under the Act for offences that can be committed by an individual. For example, section 27(2) provides for liability to be imposed on either “ the [corporate] body or individual and, in the case of a body, any officer of it who is in default” where the corporate body or individual trades under a name which misleads by including “limited”, “company limited by shares”, or any abbreviation of those words.

not undermined by failing to impose liability on individual officers who contributed to that liability.

9.191 The officer in default model provides for the liability of an “officer” who “authorises or who, in breach of his or her duty as such officer, permits” a default of certain provisions under the 2014 Act by that company.<sup>193</sup> The 2014 Act also provides that where it is proved that the defendant was aware of the basic facts concerning the default, it shall be presumed that the defendant permitted the default.<sup>194</sup> The defendant can rebut this presumption by showing that she or he took all reasonable steps to prevent the default, or that, due to circumstances beyond the defendant’s control, was unable to do so.<sup>195</sup>

#### **(a) The development of the officer in default provision**

9.192 Section 383 of the *Companies Act 1963* as originally enacted contained an officer in default provision which defined an officer in default as: “any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention [...]”.<sup>196</sup> This officer in default provision applied to more than 90 offences in the 1963 Act. Very few prosecutions were actually brought against officers in default<sup>197</sup> due to the high evidential hurdle created by the requirement that the offence be committed knowingly and wilfully. The effect of including “knowingly and wilfully” in the officer in default provision was to require the prosecuting entity to prove that a defendant satisfied the highest level of subjective fault: knowledge or intention.<sup>198</sup>

9.193 In response to this impediment, the provision dealing with officers in default was replaced by the *Company Law Enforcement Act 2001*.<sup>199</sup> This new provision differed significantly from the originally enacted provision in a number of ways:

- (1) The words “knowingly and wilfully” were removed. This suggested that an officer could be made criminally liable even if she or he lacked full knowledge of a

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<sup>193</sup> Section 270(1) of the 2014 Act (which replaced section 383 of the *Companies Act 1963*, as amended by the *Company Law Enforcement Act 2001*).

<sup>194</sup> Section 271(1) of the 2014 Act provides that “permitted” in relation to the default means “permitted in breach of the defendant’s duty as an officer of the company concerned”. Section 271 also provides that “basic facts concerning the default” means such facts, relating to the one or more acts or omissions that constituted the default, as can reasonably be regarded as indicating, at the relevant time, the general character of those acts or omissions.

<sup>195</sup> Section 271(2) of the 2014 Act provides: “In relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default unless the defendant shows that she or he took all reasonable steps to prevent it or that, by reason of circumstances beyond the defendant’s control, was unable to do so”.

<sup>196</sup> Section 383 of the *Companies Act 1963*, as amended.

<sup>197</sup> Courtney, *The Law of Private Companies* 2nd ed (Butterworths 2002) at 660.

<sup>198</sup> The hierarchy of criminal fault is outlined in the discussion on culpability of agents at the start of this chapter.

<sup>199</sup> Section 100 of the *Company Law Enforcement Act 2001*, substituted section 383 of the *Companies Act 1963*.

particular transaction or behaviour engaged in by the corporate body, so long as she or he is aware of the basic facts concerning the default.<sup>200</sup>

- (2) The liability trigger of “permits” was replaced with “in breach of his duty as such officer, permits”. This change, when coupled with the removal of “knowingly and wilfully”, introduced an objective fault requirement. The originally enacted provision only allowed for prosecution based upon a subjective knowledge or intention requirement.
- (3) A rebuttable presumption was introduced. An “officer” was presumed to have permitted a default unless he or she could establish that he or she took all reasonable steps to prevent the default or that, due to circumstances beyond his or her control, was unable to do prevent the default.
- (4) This new provision expressly noted that each director and secretary (but not each “officer”) was under a duty to ensure that the requirements of the Companies Acts are complied with by the company. As this duty does not apply to all “officers”, it will not apply in relation to all defaults. “[D]irectors and secretaries” therefore have a greater capacity to permit a default under the 2001 Act model, than other “officers” do.

9.194 The effect of these changes was to significantly lighten the burden placed upon the prosecuting entity in proving an “officer” had acted in default in relation to a contravention of the *Companies Acts*. The changes to the officer in default provision brought about by the *Company Law Enforcement Act 2001* have been substantially retained in the *Companies Act 2014*.<sup>201</sup>

9.195 Although the Explanatory Memorandum for the 2014 Act notes that sections 270 and 271 are intended to “maintain” the law as provided in by the *Company Law Enforcement Act*

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<sup>200</sup> The words “knowingly and wilfully” were removed from section 383 of the 1963 Act by section 100 of the *Company Law Enforcement Act 2001*. This amendment followed from a recommendation in the 1998 *Report of the Working Group on Company Law Compliance and Enforcement*. The Explanatory and Financial Memorandum to the *Company Law Enforcement Bill 2000* at 28 explained the change as follows: “At present, ‘officer in default’ is defined as ‘any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention’ in question. This section replaces that definition with one which is more specific and more easily proved in court; the existing definition is problematic as it is very difficult to prove that a person acted knowingly and wilfully in relation to a given offence. The new section makes no reference to acting ‘knowingly and wilfully’ and creates the presumption that an officer of the company has permitted the default, etc. in question unless he or she can prove otherwise.”

<sup>201</sup> Department of Jobs, Enterprise and Innovation, *Companies Act 2014 Explanatory Memorandum* at 87, notes that “the pre-existing officer in default provision under the previous law is maintained. The section provides clarity to the fact that an officer may have a legitimate excuse as to why something happened, or did not happen, as the case may be, for example, the officer may have been absent at the time of the default in question. This section derives from section 383 of the Companies Act 1963, as substituted by section 100 of the Company Law Enforcement Act 2001.”

2001, the officer in default mechanism in the 2014 Act differs from the 2001 Act's provision in a number of ways:

- (1) The 2014 Act<sup>202</sup> introduces an express requirement that the prosecuting entity demonstrate that the officer "was aware of the basic facts concerning the default" prior to the presumption being raised. This renders the 2014 Act's provision less onerous on the "officer" than the 2001 Act's provision, which only required the prosecuting entity to prove that the defendant was in fact an "officer" prior to the presumption being raised;
- (2) A general duty similar to that placed on each director and secretary in the 2001 Act's officer in default provision<sup>203</sup> is retained by the 2014 Act, but is not located in the officer in default sections of that Act.<sup>204</sup> This duty is altered somewhat in the 2014 Act, however, as it only places this duty on "directors", removing the duty placed on "secretaries". This change has the effect of narrowing the application of the officer in default provision, as no "officer" other than a director can permit a default in breach of this general duty.

9.196 As such, the effect of the changes to the officer in default mechanism contained in the 2014 Act has the effect of narrowing the mechanisms application somewhat, when compared to the model provided by the *Company Law Enforcement Act 2001*.

#### **(b) Authorise or, in Breach of the Duty as an Officer, Permit**

9.197 The officer in default model provides for imposition of derivative liability. The liability of an officer in default is contingent upon that officer's culpable participation in, contribution to, or facilitation of certain contraventions of the *Companies Act 2014*. The officer in default model uses "authorising a default", and, "in breach of his or her duty as such officer, permitting a default", as triggers for this derivative liability in a similar manner to which the consent, connivance or neglect model uses its liability triggers. Like the consent, connivance or neglect model, both of these liability triggers unify the description of both the level of culpability and type of conduct required in order for liability to be imposed. Again, the fault and conduct required by each trigger will be considered separately under different headings.

#### **(c) Participant's fault**

##### *(i) Authorises*

9.198 As with the previous incarnations of the officer in default model, the 2014 Act does not provide any guidance as to what amounts to authorisation. Additionally, at the date of

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<sup>202</sup> Section 271(2).

<sup>203</sup> To ensure that the requirements of the *Companies Acts* are complied with by the company.

<sup>204</sup> This provision is recreated in section 223(1) of the 2014 Act.

writing, there have been no reported decisions in which the courts have provided guidance as to what amounts to “authorises” in the specific context of the officer in default model.

9.199 It is arguable that proof of some knowledge will be required in order to demonstrate that an “officer” authorised a contravention, as a person cannot be said to authorise a particular act unless she or he is aware of the activity being carried on.<sup>205</sup> However, this may not need to be a comprehensive knowledge of the default being authorised. Weight is lent to this suggestion by the removal of “knowingly and wilfully” from the officer in default model. This indicates that an “officer” can authorise despite the fact that she or he lacked full knowledge of a particular transaction or behaviour engaged in by the company, in its contravention of the Act.

9.200 The requirement of knowledge on the part of an officer means that this liability trigger caters for the circumstances in which the officer has contributed to or facilitated a company’s default with the highest degree of culpability recognised by the criminal law.

(ii) *In breach of his or her duty as such officer, permits*

9.201 In general, in criminal law provisions, to “permit” (taken on its own) requires proof of a degree of subjective fault.<sup>206</sup> The officer in default model does not provide for permission on its own, however. This model provides that an “officer” must, “in breach of his or her duty as such officer, permit”. This changes the meaning of “permit”, and requires that the “officer” failed to meet a duty owed to the company, which permits the contravention of the *Companies Act* by the company. This liability trigger provides an objective fault requirement akin to a simple negligence.

9.202 As this trigger incorporates an objective fault requirement, an “officer” can attract liability despite having no actual knowledge of the company’s contravention of the Act. This form of permission covers tacit approval through neglect. It has been suggested that the relevant breach of a duties could, in addition to the duties specifically provided for under the 2014 Act, include a breach of other statutory duties, breach of an equitable or common law duties,<sup>207</sup> or duties properly assigned to the officer in the course of work.<sup>208</sup>

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<sup>205</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 91.

<sup>206</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 90; *Redhead Freight Ltd v Shulman* [1988] Crim LR 696. In *Price v Cromack* [1975] 1 WLR 988 [1975] 2 All ER 113, the UK House of Lords determined that “knowingly permitting [...] involves a failure to prevent [which] must be accompanied by knowledge” (at 993, citing *Alphacell Ltd v Woodward* [1972] AC 824, at 834).

<sup>207</sup> Ahern, *Director’s Duties* (Roundhall 2009) at 327.

<sup>208</sup> Courtney and O’Leary, *The Law of Companies* 4th ed (Bloomsbury Professional 2016) at 1003.

However, in the case of directors, there is a specific positive and unqualified duty to ensure that the company complies with the 2014 Act.<sup>209</sup>

Section 223(1) of the *Companies Act 2014*

“It is the duty of each director of a company to ensure that this Act is complied with by the company.”

9.203 This liability trigger is comparable to the “any neglect” trigger of the consent, connivance or neglect models in terms of its fault requirement.

(iii) *Disparity of culpability and unfair labelling*

9.204 As with the consent, connivance or neglect model, the officer in default model affords the prosecuting entity the discretion of choosing to ground their case on either subjective fault (the “officer” authorised the default), or objective fault (the “officer’s” breach of duty permitted the default). The vast majority of the contraventions of the 2014 Act to which the officer in default provisions apply are of a strict liability nature. As such, in relation to this majority, the officer in default provisions will not allow the an officer in default to be subject to criminal liability based on a lower level of culpability than the company that has committed the substantive contravention. However, there are a small number of offences to which the officer in default model applies, in which knowledge or subjective recklessness requirements must be satisfied in relation to the company in order to ground the substantive contravention.<sup>210</sup>

9.205 In relation to section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, there is a disparity in culpability, combined with the distinction in wrongful conduct required of the party which commits the substantive contravention and the officer in default. This results in the officer in default model attracting the same criticism of unfair labelling as the currently enacted consent, connivance or any neglect provisions.

9.206 The officer in default model is currently a legislation-specific model of officer liability, as the *Companies Act 2014* is the only example of its use in Irish law. However, the Commission has considered whether to extend it to form the basis of a general scheme of derivative senior managerial agent liability.

9.207 The disparity or culpability and unfair labelling issues that currently face the 2014 Act are focused on a small number of sections. However, if this model were to be applied to all

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<sup>209</sup> Section 223(1) of the *Companies Act 2014*. This section places this duty on “directors”, which will include both shadow and *de facto* directors, but does not expressly place this duty on other “officers” of the company. This duty replicates that initially introduced by section 100 of the *Company Law Enforcement Act 2001*, but narrows the duty’s application by imposing it only on directors, rather than on “each director and secretary of the company”, as was the case in the 2001 Act.

<sup>210</sup> Sections 468(10), 492(10), 1133(10) and 1155(9) of the *Companies Act 2014*.

subjective-fault based offences, the disparity or culpability and unfair labelling issues would become much more significant.

(iv) *Conclusion*

9.208 This model of derivative company officer liability covers a greater range of culpability than the generally applicable aids, abets, counsels or procures model. This model covers the same range of culpability covered by the consent, connivance or neglect model: all levels of culpability between knowledge and simple negligence are catered for. However, this model differs from the consent, connivance or neglect model in that it does not expressly provide for a liability trigger that covers corporate agents who recklessly, or with wilful blindness contribute to, the offending of the company. The officer in default model can allow such agents to be held to account by applying the lower culpability requirement of negligence to them (using the “in breach of his or her duty as such officer, permits” liability trigger). As such, this model adopts a less complete approach to corporate agent culpability.

9.209 Like the consent, connivance or neglect model, this model does not ensure that the fault required of the secondary participant track that required of the principal offender. This results in this model attracting disparity of culpability and unfair labelling criticisms.

9.210 As noted earlier in this chapter, it is the Commission’s view that the level of culpability required of a secondary participant should track that required of the principal offender. This model’s failure to expressly cater for the reckless complicity of a corporate agent means that, were this culpability tracking requirement incorporated into the officer in default model, such reckless agents would be inadequately catered for. It is the view of the Commission that this issue makes this model inappropriate for use as a basis for a general scheme of corporate agent complicity.

**(d) Participant’s conduct**

(i) *Authorises*

9.211 As noted above, neither the 2014 Act nor case law (to date) has provided any significant guidance as to what form of conduct amounts to authorisation. However, the inclusion of “authorises” as a liability trigger appears to allow liability to be imposed on an “officer” who has “positively” authorised the company’s contravention of the *Companies Act 2014*.<sup>211</sup> A positive act of authorisation will be required, rather than merely authorising a contravention by passive acquiescence, or negligent or reckless omission.

9.212 “Authorises” is therefore very similar to the “consented to” liability trigger in the consent, connivance or neglect model, in terms of its conduct requirement.

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<sup>211</sup> Ahern, *Director’s Duties: Law and Practice* (Roundhall 2009) at 327.



(ii) *In breach of his or her duty as such officer, permits*

(iii) *Rather than requiring a positive act of permission, this liability trigger allows for either a positive act, or mere acquiescence, by an officer, to amount to permitting.*<sup>212</sup> *This objective liability trigger thereby provides for the criminalisation of both positive acts and omissions on the part of the “officer”.*<sup>213</sup>

9.213 This liability trigger is comparable to the “any neglect” trigger of the consent, connivance or any neglect model in terms of the conduct it covers. A significant difference between these two models, however, is that the “in breach of his or her duty as such officer, permits” trigger allows liability to be imposed without requiring proof of causation.<sup>214</sup>

(iv) *Conclusion*

9.214 The officer in default (*Companies Act 2014*) covers a similar range of conduct to the consent, connivance or neglect model: both positive acts of authorisation and permissive omissions are covered by this model. However, like the fault element of this model (considered above) the conduct requirement has a narrower scope than the consent, connivance or neglect model.

#### **(e) Scope of participants to be subject to liability**

(i) *Targeting an “officer” – an alternative to a functions-based test*

9.215 As its title suggests, the officer in default model targets “officers” of the corporate body for the imposition of criminal liability. The *Companies Act 2014* defines an “officer” as including “a director or secretary [of a body corporate]”.<sup>215</sup> This definition is non-exhaustive, and so directors and secretaries are but two examples of “officers”.<sup>216</sup> This inclusive approach to defining a corporate officer provides no further guidance as to who can amount to an “officer” within the corporate body, aside from directors and secretaries.

9.216 Over time, case law stepped in to provide more clarity to this definition. In *Glover v BLN Ltd* the Supreme Court held that “[t]he characteristic features of an officer are that it is

<sup>212</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 90-91; *Redhead Freight Ltd v Shulman* [1988] Criminal LR 696.

<sup>213</sup> Courtney and O’Leary, *The Law of Companies* 4th ed (Bloomsbury Professional 2016) at 1003.

<sup>214</sup> In *Redhead Freight Ltd v Shulman* [1988] Criminal LR 696 the court compared “causing” and “permitting” offending, noting that to “cause” something there “must be evidence of a positive act as distinct from mere passive acquiescence in the commission of an offence” which is sufficient to “permit” the offending.

<sup>215</sup> Section 1 of the *Companies Act 2014*. This is the same definition as appeared in section 1 of the *Companies Act 1963*.

<sup>216</sup> Courtney, *The Law of Private Companies* 2nd ed (Butterworths 2002) at 726.

created by [...] [the constitution] of a company.”<sup>217</sup> Courtney provides a working definition of “officer” for the purpose of the *Companies Acts*, as being “a person who is a director, secretary, auditor or who holds any other office that has been created by a company’s constitution.”<sup>218</sup> Prior to the enactment of the 2014 Act, the Company Law Review Group recommended that the definition of “officer” be extended to include shadow directors and *de facto* directors.<sup>219</sup> This recommendation was enacted for the purposes of the officer in default provisions of the 2014 Act.<sup>220</sup> The definition of “officer” in the officer in default (*Companies Act 2014*) provisions therefore includes the following:

- (1) Shadow director – a person in accordance with whose directions or instructions the directors of a company are accustomed to act, unless the directors are accustomed so to act by reason only that they do so on advice given by him or her in a professional capacity;<sup>221</sup>
- (2) *De facto* director – a person who occupies the position of director of a company but who has not been formally appointed as such director. A person shall not be a *de facto* director of a company by reason only of the fact that she or he gives advice in a professional capacity to the company or any of the directors of it.

9.217 Unlike the functions-based tests provided for in currently enacted consent, connivance or neglect models, the officer in default (*Companies Act 2014*) model does not seek to identify the persons on whom it can impose liability. In determining whether someone is an “officer” for the purposes of the officer in default model, the court will have less regard to whether that person was “involved”<sup>222</sup> or “concerned”<sup>223</sup> in the management of the corporate body.

9.218 In *Re National Irish Bank Ltd: Director of Corporate Enforcement v D’Arcy*<sup>224</sup> the High Court considered whether the respondent could fall under the ambit of a provision which

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<sup>217</sup> *Glover v BLN Ltd* [1973] IR 388, at 414.

<sup>218</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 812.

<sup>219</sup> Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill* (2007) at 42.

<sup>220</sup> The definition of “officer” was extended to include the shadow directors (section 221) and *de facto* directors (section 222) for the whole of Part 5 of the *Companies Act 2014*, which provides, inter alia, the officer in default provisions.

<sup>221</sup> This is a similar expansion of the definition of director as is seen in other pieces of legislation, such as section 2 of the *Safety, Health and Welfare at Work Act 2005*.

<sup>222</sup> *R v Boal* [1992] QB 591, at 593.

<sup>223</sup> Section 26 of the *Australian Occupational Health and Safety Act 2000*.

<sup>224</sup> *Re National Irish Bank Ltd: DCE v D’arcy* [2006] 2 IR 163.

applied only to “an officer” of a company.<sup>225</sup> The applicant contended that as the respondent operated in an elevated management position, he should fall within the meaning of the term “officer”. The Court (Kelly J) rejected this contention, noting that “[t]he term ‘manager’ is not included in the definition of ‘officer’ in the Irish legislation. It is therefore arguable that, having regard to this distinction, the respondent does not fall within the definition of ‘officer’ as prescribed by the Irish legislation.” Kelly J noted that this was the case, despite the definition of “officer” being non-exhaustive.<sup>226</sup>

9.219 Kelly J also referred to the decision in *R v Boal*, but noted that the persuasive value of this case was lessened, as *Boal* dealt with a different definition to the one that the court was considering (a consent, connivance or neglect type provision). Horan relies on this case for her proposition that the term “manager” is not included in the definition of “officer” in the *Companies Acts 1963 to 2009* (which contains the same definition of “officer” as the 2014 Act).<sup>227</sup> Courtney makes a similar proposition in relation to the 2014 Act.<sup>228</sup>

9.220 The inclusion of shadow *de facto* directors broadens this definition. However, this is still a narrow definition when compared to that of the functions-based tests considered above. While the inclusion of shadow director does extend the definition, this is only a limited “upward” extension. Rather than extending the officer in default provisions to cover persons with influential roles in the corporate body generally, this change only extends the provisions to cover persons in accordance with whose directions or instructions the directors of a company are accustomed to act (other than professional advisors).

9.221 The inclusion of *de facto* directors broadens “officer” further than shadow directors, as it covers something like a general function: a person who fulfils the role of director in substance rather than in form. Prior to the 2014 Act, there was no statutory definition of *de facto* director, and the definition within the 2014 Act remains a vague one. To understand the extent to which the inclusion of *de facto* director extends the scope of “officer”, it is instructional to look at the common law definition that was relied upon by the courts prior to the introduction of the statutory definition. The statutory definition of *de facto* director extends the common law definition provided in *Re Lynrowan Enterprises Ltd*,<sup>229</sup> in that *de facto* directors shall (for specific purposes of the Act) be treated as directors of the company other than merely for the purposes of restriction orders.<sup>230</sup> In *Lynrowan*, in response to the rhetorical question of which kind of activities or roles result

<sup>225</sup> Kelly J for the High Court was considering the definition of “officer” under section 159 the *Companies Act 1990*, in proceedings for the disqualification for the respondent. This definition of “officer” differs somewhat to the definition contained in either the *Companies Act 1963* or the *Companies Act 2014*, in providing that “‘officer’ in relation to any company, includes any director, shadow director or secretary of the company”. As with the 2014 Act definition, this definition is also non-exhaustive.

<sup>226</sup> *Re National Irish Bank Ltd: DCE v D’arcy*, [2006] 2 IR 163, at 26.

<sup>227</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 153.

<sup>228</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 814.

<sup>229</sup> High Court (O’Neill J), 31 July 2002.

<sup>230</sup> Department of Jobs, Enterprise and Innovation, *Companies Act 2014 Explanatory Memorandum* at 77.

in a person being deemed a *de facto* director, the High Court (O’Neill J) cited with approval the following passage from English High Court case *Re Richborough Furniture Limited*<sup>231</sup>

“It seems to me that for someone to be [...] a *de facto* director, the Court would have to have clear evidence that he had been either the sole person directing affairs of the company (or acting with others all equally lacking in a valid appointment [...]) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts or the person in question are referable to an assumed directorship or to some other capacity such as shareholder or as here, consultant, the person in question must be entitled to the benefit of the doubt.”

- 9.222 Based upon the above, the statutory definition of *de facto* director does not have the effect of extending the definition of “officer” such that the scope of the officer in default (*Companies Act 2014*) model is comparable to that of the functions-based tests considered above. The statutory definition only extends the definition of “officer” to persons who can be clearly proven to operate with the functions of a *de jure* director as distinct from any other function (such as those of a shareholder or consultant).
- 9.223 The definition of “officer” provided in the 2014 Act plays a similar gate-keeping role for the officer in default (*Companies Act 2014*) model, as the functions-based test does for the consent, connivance or neglect model. A person cannot be made subject to liability under the officer in default (*Companies Act 2014*) model, unless they satisfy the definition of “officer”. However, as has been outlined above, this is a much narrower definition than those included in the functions-based test. The officer in default (*Companies Act 2014*) model offers a far less widely applicable approach to officer liability than the consent, connivance or neglect approach.
- 9.224 At the date of writing, there has been no reported decision that provides any detailed analysis of scope of the definition of “officer” in the context of applying the officer in default (*Companies Act 2014*) model. However, the above discussion indicates that the effect of the 2014 Act’s narrow definition of “officer” necessarily qualifies the officer in default model’s ability to fulfil the aims of individual sanction provisions.
- 9.225 The justification for providing for a functions-based test which allows liability to be targeted at individuals with influential roles, who have culpably engaged in the offending of a corporate body, regardless of the title or form of the individual’s role, has been outlined above. The Commission is of the view that this justification is entirely appropriate. As such, the Commission is also of the view that, in a proposed general scheme of individual officer liability, the use of a narrower test to determine which

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<sup>231</sup> *Re Richborough Furniture Limited* (1996) 1 BCLC 507.

individuals may be subject to liability, which fails to include all influential persons, would have the effect of leaving the criminal law under-inclusive.

(ii) *Derivative liability*

- 9.226 As with the consent, connivance or neglect model, the officer in default model provides for the imposition of derivative liability. The liability of an officer in default is contingent upon that officer's culpable participation in, contribution to, or facilitation of certain contraventions of the *Companies Act 2014*.
- 9.227 In currently enacted consent, connive or neglect provisions, the liability of the director, manager or other similar officer is always contingent on the commission of an offence by the body corporate (regardless of whether the body has been prosecuted or convicted).<sup>232</sup> The officer in default model similarly derives the officer's criminal liability from a failure to comply with a provision of the *Companies Act 2014*. However, depending on the provision contravened, this default might be committed by, for example, the company itself,<sup>233</sup> by someone acting on behalf of the company,<sup>234</sup> or by a director of the company.<sup>235</sup> The officer in default model can be distinguished from the consent, connivance or neglect model, therefore, in that it provides more flexibility in deriving the liability of senior managerial agents.
- 9.228 This flexibility notionally extends to a situation in which the officer in default model provides for "self-executing" personal criminal liability. If a provision to which the officer in default model applies allows for a contravention of the 2014 Act to be committed by a natural person, a situation may arise in which the officer in default may also be the natural person committing the default. An example of a provision with such flexibility is Section 137(6) of the *Companies Act 2014*.

Section 137(6) provides that an officer in default may be guilty of an offence, contingent on the failure of at least one of the company's directors being resident in an EEA state. Should a defendant to a prosecution under this section be a director who authorised or who, in breach of his or her duty as such officer, permitted a circumstances in which none of the directors of the company resided within the EEA, that director will be (or where there is more than one director of

<sup>232</sup> See the analysis of *the People (DPP) v Hegarty* [2011] IESC 32; [2011] 4 IR 635, in the introductory section of this chapter, and the discussion on simple negligence and constructive knowledge.

<sup>233</sup> See section 82(11) of the *Companies Act 2014*, which provides that an "officer in default" may be guilty of an offence contingent on the company's conduct of providing financial assistance in relation to the acquisition of its own shares.

<sup>234</sup> Section 531(9) of the *Companies Act 2014* provides that an "officer in default" may be guilty of an offence, contingent on the failure to include a statement of the company being in examinership on the website of the company or in e-mails to third parties, by someone acting on behalf of the company.

<sup>235</sup> See section 137(6) of the 2014 Act, which provides that an "officer in default" may be guilty of an offence, contingent on the failure of at least one of the company's directors being resident in an EEA state.

the company, will be in part) responsible for the substantive contravention of the 2014 Act, while also being the officer in default.

9.229 The flexibility in providing for how liability can be derived in the officer in default model is only possible due to this model being a legislation specific model of officer liability. The officer in default model only applies to provisions that expressly provide for its application. It is within each of these provisions that the source of the officer's derived liability under the officer in default provisions is also expressly provided. For example:

Section 27(4) of the *Companies Act 2014* provides that a company shall not, in certain circumstances, use a name which may reasonably be expected to give the impression that it is any type of company other than a private company limited by shares or that it is any other form of body corporate. Section 27(6) expressly provides the officer in default provisions apply in the case of a contravention of subsection (4) by the company.

9.230 This Report does not recommend the expanded use of the officer in default model, such that it would form the basis of a general scheme of derivative senior managerial agent liability. Outside of the *Companies Act 2014*, the formulation of offences to expressly provide for who may commit them is uncommon. The vast majority of offences, at most, provide that they apply to "a person", who may be natural or legal.<sup>236</sup>

9.231 Applying the officer in default model to a generally applicable provision, such as section 6 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, would necessarily allow derivative liability to be imposed on an officer who was in default in relation to the offending of any person, regardless of that person's nexus to the operations of the corporate body.

9.232 The Commission is of the view that such application of the officer in default model would allow derivative liability to be imposed in far wider circumstances than can be justified.

**(f) Burden shifting provision**

9.233 Section 271(2) of the *Companies Act 2014* provides that, in relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default. The defendant may rebut this presumption by demonstrating that he or she took all reasonable steps to prevent it or that, because of circumstances beyond their control, was unable to do so.

9.234 The officer in default provisions in the 2014 Act provide a rebuttable presumption that the "permits" liability trigger has been satisfied, unless the defendant "officer", in "relevant

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<sup>236</sup> See the discussion on the corporate body as a legal person in Chapter 8.

proceedings”, can show that she or he took all reasonable steps to prevent the default concerned, or that the default was beyond his or her control.<sup>237</sup>

9.235 Section 60 of the 1963 Act (the predecessor to section 82 of the 2014 Act), was the offence charged in *The People (DPP) v Whelan and McAteer*<sup>238</sup> in which it was established that the company in question, a bank, had provided unlawful financial assistance in contravention of section 60 of the 1963 Act, and that the defendants (directors of the company) were aware of this. The trial judge in the Circuit Criminal Court applied the “officer in default” provision in section 383 of the *Companies Act 1963*. The defendants failed to rebut the presumption that they permitted the default contained in section 383. Subsequently, the jury convicted them of the offence under section 60 of the 1963 Act.

9.236 The officer in default provision applied in that case was originally substituted into the *Companies Act 1963* by the *Company Law Enforcement Act 2001*. The 2014 Act retained this provision with minor alterations (outlined above). Before the burden can be shifted, it must be “proved that the defendant was aware of the basic facts concerning the default concerned”. Once this requirement is satisfied, the prosecution will not be required to prove that the defendant either authorised or permitted the default.

9.237 The burden shifting provision contained in section 271(2) of the 2014 Act is similar to the burden shifting provision considered above in the analysis of the consent, connivance or neglect provision, in that:

- (1) both provisions provide for a presumption that the trigger of the defendant’s liability has been satisfied (the defendant permitted or consented to the offending);
- (2) both provisions require the prosecution to satisfy some evidential burden in order to raise the presumption;
- (3) both provisions require the defendant to prove certain objective criteria (reasonable steps or inability to do more/circumstances beyond his or her control); and
- (4) both provisions only place this obligation on the defendant to the evidential standard, thereby leaving the legal burden of proof on the prosecution.

9.238 Though the officer in default and consent, connivance and neglect presumptions are similar, they are also distinct in the nature of what must be proved by the prosecution in

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<sup>237</sup> Section 271(2) of the *Companies Act 2014*, provides:” In relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default concerned, it shall be presumed that the defendant permitted the default unless the defendant shows that he or she took all reasonable steps to prevent it or that, by reason of circumstances beyond the defendant’s control, was unable to do so.”

<sup>238</sup> Circuit Criminal Court (Judge Nolan) 17 April 2014 (The Irish Times, 19 April 2014).

order to raise the presumption. They are also distinct in terms of what the defendant must satisfy to meet the evidential burden in order to rebut the presumption.

9.239 As was the case in the analysis of the consent, connivance or neglect presumption, the burden shifting provision contained in this model will be considered in two parts: first, how the presumption is engaged; and what must be demonstrated to rebut the presumption.

(i) *Engaging the rebuttable presumption*

9.240 The burden shifting provision in the officer in default model requires the prosecution to prove “that the defendant was aware of the basic facts concerning the default concerned”. Section 271 clarifies “basic facts concerning the default”, which means those facts “relating to the one or more acts or omissions that constituted the default, as can reasonably be regarded as indicating, at the relevant time, the general character of those acts or omissions”. Courtney notes that this places an obligation on the prosecution to establish that an officer was aware of the basic facts concerning the default.<sup>239</sup> The prosecution must establish these facts to an evidential standard in order for the presumption to be invoked.

9.241 The requirement placed on the prosecution in order to raise the consent, connivance and neglect presumption (establishing a prima facie case - considered above) is potentially broader and more onerous than that required in the officer in default presumption, as evidence must be presented of all facts in issue, not merely facts that indicate an existence of subjective fault.

9.242 One circumstance in which the obligation to raise a prima facie case when raising the consent, connivance or neglect presumption may not be as onerous as establishing “basic facts concerning the default”, is in circumstances where the prosecution is relying on an “attributable to any neglect” liability trigger. In such a case the prosecution will only be required to present evidence of objective fault to which the offending conduct is attributable, rather than facts which indicate subjective fault, as is required by the officer in default (*Companies Act 2014*).

(ii) *Rebutting the presumption*

9.243 The officer in default (*Companies Act 2014*) model requires the defendant to demonstrate (again, to the standard of the evidential burden) either:

- (1) that he or she took all reasonable steps to prevent the default concerned, or
- (2) that the default was beyond his or her control.

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<sup>239</sup> Courtney and O’Leary, *The Law of Companies* (Bloomsbury Professional 2016) at 1004.



- 9.244 Under this model, the defendant must prove that he or she acted reasonably. The Explanatory Memorandum to the 2014 Act notes that the defendant can satisfy this requirement by providing a “legitimate excuse” as to why he or she is not culpable for a default, such as having “been absent at the time of the default in question”.<sup>240</sup>
- 9.245 This requirement has been described as “peculiar”, “bizarre” and criticised as “it amounts to putting a defence into a presumption when it would have made more sense to have provided a standalone defence”.<sup>241</sup> The argument is that it does not make sense to require a defendant to establish that he or she took all reasonable steps, or that the circumstances were beyond his or her control, when meeting this high standard merely results in rebutting a presumption, rather than establishing a defence. This criticism may also apply to the presumption contained in the consent, connivance or neglect model, given the similar obligation placed on the defendant to rebut that presumption.
- (iii) *Can legal advice amount to reasonable steps?*
- 9.246 Obtaining legal advice as to whether a course of conduct is lawful is irrelevant to the question as to whether the defendant can show that she or he “took all reasonable steps” under section 271 of the *Companies Act 2014*.
- 9.247 *The People (DPP) v Whelan and McAteer*<sup>242</sup> concerned the interpretation of section 383 of the *Companies Act 1963* (since replaced by sections 270 and 271 of the *Companies Act 2014*) and the extent to which an officer of a corporate body could rely on the content of legal advice by way of a defence to a charge of being involved in the provision of a loan other than in the normal course of business contrary to section 60 of the 1963 Act.
- 9.248 In the Circuit Criminal Court, the trial judge (Judge Nolan) ruled that the issue of whether legal advice was obtained by the corporate body in relation to the transaction to which the charge under section 60 of the 1963 Act (since replaced by section 82 of the 2014 Act) related was irrelevant to the guilt or innocence of the accused.
- 9.249 The effect which obtaining professional legal and other advice should have in relation to arguments that a defendant took reasonable steps is discussed in further detail in Chapter 10, below.

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<sup>240</sup> Department of Jobs, Enterprise and Innovation, *Companies Act 2014 Explanatory Memorandum* at 87.

<sup>241</sup> Courtney and O’Leary, *The Law of Companies* (Bloomsbury Professional 2016) at 1005: “This a peculiar provision as it amounts to putting a defence into a presumption when it would have made more sense to have provided a standalone defence to section 270 and the circumstances in which a person will be found to be an officer in default. It seem bizarre that if a defendant can establish that he took all reasonable steps to prevent the unlawful act or omission or that by reason of circumstances beyond his control, he was unable to do so, the only consequence of so showing is that the presumption does not apply! Placing such a fundamental defence as a pre-condition to a presumption arising indicates confused thinking.”

<sup>242</sup> Circuit Criminal Court (Judge Nolan) 17 April 2014 (The Irish Times, 19 April 2014).

#### 4. Common law jurisdiction comparator: Officer in default - (UK) *Companies Act 2006*

9.250 The UK *Companies Act 2006* provides for the use of an officer in default model of individual officer liability that, like the Irish model, applies to all offences in the Act that expressly provides for its application.<sup>243</sup> Unlike the Irish Act, however, the UK Act also makes use of a consent, connivance or any neglect provision, which applies to any offences found under Part 42 of the UK Act. This Part provides for the law regulating statutory auditors.<sup>244</sup> The consent, connivance or any neglect model operates in much the same way as similar provisions found in Irish legislation.<sup>245</sup> As such, it is not intended to discuss the use of that model in the UK Act further here.

9.251 The officer in default model found in the UK *Companies Act 2006* differs significantly from that found in the *Companies Act 2014*, however, and its scope and application shall be considered here.

##### Section 1121 of the (UK) *Companies Act 2006* - Liability of officer in default

This section has effect for the purposes of any provision of the Companies Acts to the effect that, in the event of contravention of an enactment in relation to a company, an offence is committed by every officer of the company who is in default.

For this purpose “officer” includes—

any director, manager or secretary, and

any person who is to be treated as an officer of the company for the purposes of the provision in question.

An officer is “in default” for the purposes of the provision if he authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention.

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<sup>243</sup> Section 1121 of the UK *Companies Act 2006*.

<sup>244</sup> Section 1255(1) of the UK *Companies Act 2006* provides that “where an offence under [Part 42 of the Act] committed by a body corporate is provide to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.”

<sup>245</sup> See Pinto & Evans, *Corporate Criminal Liability* 3rd ed (Sweet & Maxwell 2013) at paragraphs 6-8 and 6-9.

9.252 The officer in default model provided in section 1121 is derived from various provisions of the previous UK *Companies Act 1985*,<sup>246</sup> which was replaced by the 2006 Act following a review of the UK's Company law in the late 1990s and early 2000s.<sup>247</sup> Subsection (3) provides for three grounds for the liability of an "officer in default", where the officer:

- (1) Authorises or permits the contravention;
- (2) Participated in the contravention; or
- (3) Failed to take reasonable steps to prevent the contravention.

9.253 Like both the consent, connivance or neglect model, and the officer in default (*Companies Act 2014*) model, the liability triggers in this model unify the description of both the level of culpability and type of conduct required in order for liability to be imposed. Again, the fault and conduct required by each trigger will be considered separately under different headings.

**(a) Participant's fault**

(i) *Authorises or permits the contravention*

9.254 This ground for liability appears to cover two forms of conduct, however the culpability required either to authorise or to permit a default will be the same. Much like the *Companies Act 2014*, the UK Act fails to provide any guidance as to what form of fault is required to authorise a default under the UK Act. However, it is likely that an act of authorisation accompanied by some knowledge, but not necessarily full knowledge of the default in question, will satisfy this requirement.<sup>248</sup> "Permits" in this model, differs significantly from the "in breach of his or her duty as such an officer, permits" liability trigger that appears in the *Companies Act 2014*. The term "permits", in this provision, indicates a requirement to prove a similar degree of subjective fault as is necessary to prove "authorises".

(ii) *Participated in the contravention*

9.255 To "participate" in offending is the "act of taking part in something, such as [...] a crime".<sup>249</sup> The UK *Companies Act* does not provide any further guidance as to what level of fault is required of an officer in order for liability to be imposed on this ground. However, under UK criminal law, a person can participate in the commission of a crime as a principal, a

<sup>246</sup> Sections 730(5), 733(2) and 744 of the (UK) *Companies Act 1985*.

<sup>247</sup> This review was carried out by a Company Law review Steering Group under the auspices of the UK Department of Trade and Industry between 1998 and 2001, and resulted in the production of *Modern Company Law for a Competitive Economy: Final Report*, (UK Department of Trade and Industry 2001).

<sup>248</sup> See the discussion of participant's fault and conduct in the Officer in Default section of this chapter for an analysis of the "authorises" liability trigger provided by section 270 of the *Companies Act 2014*.

<sup>249</sup> *Black's Law Dictionary* 8th ed (Thomson West 2004) at 1151.

joint-principal, an accessory, or as part of a joint enterprise.<sup>250</sup> The level of fault required under this ground will depend upon the requirements of whichever doctrine of participation is being relied on by the prosecution.

(iii) *Failed to take reasonable steps to prevent the contravention*

9.256 This ground allows liability to be imposed based upon the objective fault of an officer due to his or her failure to take all reasonable steps to prevent the contravention. This is a very broad basis for liability, as it allows an officer to be in default even in circumstances where he or she takes some, but not all, reasonable steps to prevent the contravention.<sup>251</sup> Further, as this is an objective fault ground for liability, the officer can attract liability despite a lack of knowledge or intent on his or her part.

9.257 While this basis for liability again differs from those provided in the *Companies Act 2014*, it allows liability to be imposed in similar circumstances to the “in breach of his or her duty as an officer, permits” ground for liability,<sup>252</sup> in other words based on simple negligence.

(iv) *Conclusion*

9.258 This model of derivative company officer liability model covers the same range of culpability covered by the officer in default (*Companies Act 2014*) provisions, from knowledge to simple negligence. This model is also similar to the Irish officer in default model in that it does not expressly cover corporate agents who recklessly, or acting with wilful blindness contribute to, or facilitate, the offending of a company. However, such culpable conduct will be captured by the “failed to take reasonable steps to prevent” ground for liability. As such, this model attracts the same criticism as the Irish officer in default model, in that it is an under inclusive approach. The Commission takes the view that this renders this model an inappropriate basis for devising a general scheme of corporate agent complicity.

**(b) Participant’s conduct**

(i) *Authorises or permits the contravention*

9.259 As is case with the *Companies Act 2014*, the UK 2006 Act fails to provide any guidance as to what form of conduct amounts to authorisation. It is likely, however, that this basis for liability will be satisfied by a positive act of authorisation on the officer’s part.<sup>253</sup> The conduct that amounts to authorisation in this section is therefore (like the basis in the

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<sup>250</sup> See a summary of the bases for criminal liability in the Law of England and Wales in Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 205.

<sup>251</sup> Pinto & Evans, *Corporate Criminal Liability* 3rd ed (Sweet & Maxwell 2013) at 265.

<sup>252</sup> As outlined in the discussion of participant’s fault and conduct in the Officer in Default section of this chapter.

<sup>253</sup> Rather than merely authorising a contravention by passive acquiescence.

2014 Act) very similar to the “consented to” liability trigger in the consent, connivance or neglect model.<sup>254</sup>

9.260 “Permits” extends the conduct covered by this ground beyond merely positive acts. This basis for liability may also be satisfied where the officer acquiesces to the contravention of the UK *Companies Act*. In this manner, this basis for liability is similar to the connivance liability trigger in the consent, connivance or neglect model.<sup>255</sup>

(ii) *Participated in the contravention*

9.261 As is the case for the fault requirement under this ground, the UK *Companies Act* does not provide any further guidance as to what the “officer” must do to “participate” in a contravention of the Act. Again, the conduct required of the “officer” will depend on which doctrine of participation the prosecution is relying upon.

(iii) *Failed to take reasonable steps to prevent the contravention*

9.262 Acquiescence or omission on the part of an officer is sufficient to attract liability on this ground. In terms of conduct covered, this liability ground covers a similar range of conduct as the “in breach of his or her duty as an officer, permits” ground in the officer in default (*Companies Act 2014*), and the “any neglect” ground in the consent, connivance or neglect provision.

(iv) *Conclusion*

9.263 The officer in default (UK *Companies Act 2006*) covers both positive acts of authorisation and permissive omissions. However, in providing an “authorises and permits” ground for imposing liability, this model is more complete in the conduct it covers than the Irish officer in default provision. It expressly provides for the tacit agreement of an officer to a default, rather than leaving such conduct to be captured by a more general omission liability trigger.

9.264 This model provides all the detail as to the scope of conduct found in the consent, connivance or neglect model. However, the officer in default (UK *Companies Act 2006*) model goes even further than that model, by expressly covering other, non-secondary, participation in the default.

9.265 While the officer in default (*Companies Act 2014*) model does not expressly provide for this form of conduct to be covered, the Irish criminal law does include various doctrines of participation that can be applied to criminal offences under the *Companies Act 2014*. This

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<sup>254</sup> As outlined in the discussion of participant’s fault and conduct in the Consent, Connivance or Neglect section of this chapter.

<sup>255</sup> As outlined in the discussion of participant’s fault and conduct in the Consent, Connivance or Neglect section of this chapter.

would allow for a similar application of the criminal law to that expressly provided for by the UK provision.

**(c) Scope of participants to be subject to liability**

9.266 The UK's officer in default mechanism provides for a different definition of "officer" than that which appears in the *Companies Act 2014*.<sup>256</sup> Like the 2014 Act, the UK definition of officer includes "director"<sup>257</sup> and "secretary" of the company. However, unlike the 2014 Act, the UK definition also includes "any manager" and "any person who is to be treated as an officer of the company for the purposes of the provision in question". The effect of including these two further descriptors within the definition of "officer" is to extend the scope of application of the officer in default mechanism of the UK Act beyond that of the 2014 Act. As outlined in the discussion on the scope of participants to be subject to liability under the officer in default model in the 2014 Act, the scope of application of the Irish officer in default model is by and large confined in its application to "a person who [...] holds [an] office that has been created by a company's constitution",<sup>258</sup> plus *de facto* and shadow directors.

(i) *Any manager*

9.267 The inclusion of "any manager" in the UK model expressly extends its application beyond officer holders, to persons exercising a specific function (management), and so the model incorporates a functions-based test. The UK's officer in default approach may attract the same criticism attracted by other functions-based tests considered, in that it leaves some uncertainty as to how far down the chain of command "any manager" might be found.<sup>259</sup> However, unlike the 2014 Act approach, the inclusion of "any manager" in the definition of "officer" allows liability to be targeted at individuals with influential roles, who have culpably engaged in the offending of a corporate body, regardless of the title or form of the individual's role. The intention of including this category of persons as subject to liability under the officer in default model was to ensure that "relatively senior employees, with a policy and decision-making role which can affect the enterprise substantially and

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<sup>256</sup> As outlined in the discussion on the scope of participants to be subject to liability in the Officer in Default section of this chapter.

<sup>257</sup> Similarly to the 2014 Act, the UK *Companies Act 2006* includes any person occupying the position of director, by whatever name called (section 250(1)) in the definition of "director". This includes both *de facto* directors and shadow directors. Unlike the 2014 Act, however, the UK *Companies Act* allows for a legal person (as distinct from a natural person) to act as a director of the company (subject to exceptions).

<sup>258</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 812.

<sup>259</sup> See Foster, *Workplace Health and Safety Law in Australia* (Lexis Nexis 2016) at 418, who noted similar criticism regarding section 26 of the Australian *Occupational Health and Safety Act 2000*, which provided for liability to be imposed on persons "concerned in management", a similarly vague phrase.

knowingly [...] have responsibility for the function which is the subject of the breach” do not escape liability.<sup>260</sup>

9.268 The Commission approves of this scope of application over the narrower scope of application of the officer in default provisions in the 2014 Act.

(ii) *Any person who is to be treated as an officer of the company for the purposes of the provision in question*

9.269 The inclusion of “any person who is to be treated as an officer of the company for the purposes of the provision in question” appears to allow for the application of a functions-based test that is even broader than a management functions-based test (such as that considered in the consent, connivance or neglect section above). The phrase “any person who is to be treated as an officer of the company for the purposes of the provision in question” allows for liability to be imposed on persons holding an office created by the company’s constitution (and *de facto* and shadow directors, which also go beyond this scope of officer holders). It also allows for liability to be imposed on persons who exercise the functions of an “officer”, regardless of the title or form of the individual’s role, and even in circumstances where that function does not include exercising a managerial function.

9.270 This addition to the officer in default model’s scope of application, combined with the inclusion of “any manager” in the definition of “officer”, casts a wide net over persons who may be found to be in default based upon the grounds for liability assessed above.

#### **(d) Burden shifting provision**

9.271 The officer in default (UK *Companies Act 2006*) provision does not contain a reversed burden provision.

### **5. Civil Law jurisdiction comparator – the French Penal Code’s accomplice provision**

9.272 The *French Penal Code* does not make special provision for the derivative criminal liability of an officer or managerial agent of a corporate body. The Code generally provides for secondary liability to be imposed upon any natural person as an accomplice to (secondary participant) or co-actor (joint primary participant) in an offence. Under the *French Code* an employee or agent of a corporate body may be held liable for the offending of that corporate body when he or she:

Knowingly -

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<sup>260</sup> UK Department of Trade and Industry, *Company Law Reform – White Paper* (March 2005) at 38.

1. by aiding and abetting, facilitates the:

(a) preparation, or

(b) commission of the corporate body's offending; or

2. by means of a gift, promise, threat, order, or an abuse of authority or powers:

(a) provokes the commission of corporate body's offending, or

(b) gives instructions to commit the corporate body's offending.<sup>261</sup>

**(a) Participant's fault**

9.273 The *French Code's* accomplice liability provisions only allow for secondary liability to be imposed based upon the highest level of subjective culpability, the defendant's knowing participation in the offending. This means that the *French Code* will not allow liability to be imposed on a secondary participant where his or her culpability is anything less than knowledge. Arguably, the express reference to inchoate liability in this provision ("preparation", considered below) necessitates the *French Code's* sole reliance on knowledge as the fault element for secondary liability. The purpose of this may be to counter the potentially extremely broad scope of wrongful conduct which can accrue criminal liability for aiding and abetting, or facilitating another's inchoate offending.<sup>262</sup>

9.274 It is the Commission's view that this an inappropriate limit to place on the imposition of derivative liability of a managerial agent in a corporate context. As noted above, the nature of a managerial agent's secondary participation in corporate offending is distinct from general secondary participation in offending.

9.275 The effect of the *French Code's* sole reliance on knowledge as the fault element to accomplice offending means that the managerial agent who subjectively recklessly, or objectively unreasonably, fails to exercise his or her authority or control to prevent corporate offending, escapes secondary criminal liability. However, it should be noted that the French definition of "knowledge" is generally inclusive of an objective standard, including situations in which an individual should reasonably have known. Despite this, in the view of the Commission, this model renders the *French Penal Code* under inclusive.

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<sup>261</sup> Article 121-6 of the *French Penal Code* provides that "[t]he accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator." Article 121-7 provides that "[t]he accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice."

<sup>262</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14th ed (OUP 2015) at 457.



**(b) Participant's conduct***(i) Aiding and abetting*

9.276 "Aiding and abetting" in the *French Code* allows for liability to be imposed based on similar grounds as provided in the aids or abet secondary liability triggers in Irish law.<sup>263</sup> As such, this means that a corporate employee or agent's contribution to, or facilitation of corporate offending can be relatively minor, so long as it assists or encourages the principal offender to - under the *French Code* – either prepare or commit the substantive offence.

*(ii) Preparation or Commission*

9.277 None of the secondary/derivative liability provisions considered above expressly provide for whether or not the substantive offending (upon which the derivative liability will be based) must be either choate<sup>264</sup> or inchoate<sup>265</sup> in nature. In Ireland, the common law provides that for every criminal offence, a series of ancillary inchoate offences also exist for attempting that offence, conspiring to commit it, or inciting it. The Irish criminal law allows an individual to be held secondarily liable based upon the aiding, abetting, counselling or procuring model of secondary liability for inchoate attempts of offences, but not conspiracy or incitement type inchoate offences. This limitation in the application of secondary liability is based on statutory interpretation of the *Criminal Law Act 1997*,<sup>266</sup> and so will not apply to the consent, connivance or neglect, or officer in default, models of imposing derivative liability. As such, in general, secondary liability provisions will apply equally, regardless of whether the substantive offending is choate or inchoate in nature.

9.278 Unlike the Irish criminal law, The *French Code*, expressly provides that secondary liability can be imposed not only where the offence has been completed, but also where a person

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<sup>263</sup> Provided by section 7 of the *Criminal Law Act 1997* and section 22 of the *Petty Sessions (Ireland) Act 1851*.

<sup>264</sup> In which the offence has been completed; in other words, the conduct element of the offence – the *actus reus* – has been completed.

<sup>265</sup> In which the offence has not been completed; in other words, the offender has begun to act with the intention of committing the substantive offence, but has not satisfied the conduct element of that offence.

<sup>266</sup> As secondary liability provisions do not provide for criminal offences, but rather for a means of attributing liability which is derived from the commission of a substantive offence by another party, the criminal law does not provide for somebody to be subject to inchoate liability based upon their secondary liability. For example, a person cannot accrue criminal liability for attempting, conspiring, or inciting where they merely aided, abetted, counselled or procured the commission of an offence by another, see Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010) at paragraph 2.78.

However, section 2 of the *Criminal Law Act 1997* provides that the definition of "arrestable offence" includes "an attempt to commit any such offence". This definition has led the aids, abets, counsels, or procures model (contained in section 7 of the 1997 Act, and which applies to "indictable offences") to be interpreted so that secondary liability applies to crimes which are attempted, and those which are completed, but not to conspiracy or incitement offences (see *Report on Inchoate Offences* (LRC 99-2010) at 48, fn. 89).

has aided or abetted in the inchoate “preparation” of the offence. The *French Code* does not provide guidance as to what level of “preparation” of the offence is sufficient to raise liability, and so there is uncertainty as to whether or not the French Code will allow for the imposition of secondary liability for inchoate offending as generally as the Irish criminal law will.<sup>267</sup>

(iii) *Provokes the commission of an offence*

9.279 The French Code provides further grounds upon which a person can be found secondarily liable; where he or she provokes the commission of a corporate body’s offending, or gives instructions regarding the commission of the corporate body’s offending.

9.280 Provoking, in particular, is a broad concept that could reasonably include an extremely broad but uncertain range of behaviours. To prevent the risk of over criminalisation, the French Code limits the behaviours which can amount to both provoking and instructing the commission of an offence by specifically outlining the means by which a defendant can provoke or instruct (“by means of a gift, promise, threat, order, or an abuse of authority or powers”).

9.281 The provocation ground for imposing secondary liability is also more limited in its application than the aids or abets ground, in that it only applies to offences that have been committed (choate offences). As such, secondary liability cannot accrue from a person’s provocation of the preparation of an offence, unless that offence is subsequently completed. This ground requires a causative link between a defendant’s provocation and the commission of the offence.

9.282 This ground for imposing secondary liability involves a greater level of interaction with the substantive offending than the aids or abets ground, in that it requires the defendant to take specific steps to produce the commission of an offence. In this way, the French Code’s provoke ground is similar to the procure ground found in the aids, abets, counsels or procures model of secondary liability, though more defined in its scope of application.

(iv) *Gives instructions to commit the offence*

9.283 The instruction ground is couched in different terms to the provoke ground, as liability will attach where a defendant “gives instructions to commit the offending”. Liability based on this ground is not contingent on the completion of the offence, or the causative link between the defendant’s instruction and the commission of an offence. As such, this

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<sup>267</sup> Article 121-7 uses the term “preparation”, however, the *French Penal Code*’s substantive inchoate liability provisions are articles 121-4 and 121-5, which do not expressly criminalise the “preparation” of an offence, but rather criminalise only “attempts” to commit an offence. Article 121-4 provides that “The perpetrator of an offence is the person who: 1° commits the criminally prohibited act; 2° attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour.” Article 121-5 provides that “An attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator’s will.”

ground appears to allow for the imposition of what the common law would treat as inchoate liability (similar to incitement)<sup>268</sup>, rather than secondary liability. Under this provision, it is the giving of instructions that is criminalised, rather than the assistance or encouragement that the defendant gives to another party in their perpetration of an offence.

(v) *Conclusion*

9.284 In one sense, the conduct covered by the *French Code's* accomplice provision is quite limited, in that it is confined solely to positive acts on the part of a secondary participant, and does not provide for liability to be imposed based upon the participant's acquiescence or omission.<sup>269</sup>

9.285 The *French Code's* accomplice provision does go beyond the other models considered in this chapter, however, in that it expressly provides for liability to be imposed based upon the participant's contribution to the inchoate preparation of an offence, rather than merely the completion of a substantive offence. As noted above, however, the Irish criminal law does go some way to matching this aspect of the *French Code* by its provision of the inchoate offence of attempt.

**(c) Scope of participants to be subject to liability**

9.286 The *French Penal Code's* accomplice provision is a generally applicable model for imposing secondary liability. It is not confined in its scope of application beyond the general confines of application of the criminal law.

**(d) Burden shifting provision**

9.287 The French Penal Code's accomplice provision does not contain a burden shifting provision.

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<sup>268</sup> The offence of incitement relates to a person (the inciter) convincing or persuading another (the incitee), by way of command, encouragement or request to commit a criminal offence. See Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010) at 114.

<sup>269</sup> Omission can however result in liability if it reveals a "punishable collusion" - this includes previous agreements with the suspected offenders (Cour de cassation, 31 Jan 2007, AJ penal 2007 130).

## 6. Summary of Models

Model	Participant's Fault	Participant's Conduct	Scope of Participants to be Subject to Liability	Includes Evidential Burden Shifting Provision	Type of Liability	Potential Liability
Aids, abets, counsels or procures	Knowledge or intention.	Positive act of encouragement assistance, or procurement, or an omission in certain circumstances.	General application.	No.	Secondary liability.	Subject to the same potential liability as the principal offender.
Consent, connivance or neglect	Knowledge, intention, subjective recklessness, or negligence (in "any neglect" provisions).	Positive act of consent ("consent"), acquiescence or failure to prevent ("connivance" or "wilful negligent"), unreasonable omission (in the case of "any negligent").	Managerial functions test.	Yes.	Secondary liability.	Subject to the same potential liability as the principal offender.
Officer in default (Companies Act 2014)	Qualified knowledge or intention ("authorises"), or negligence ("in breach of duty permits").	Positive act of authorisation "authorises"), or unreasonable omission ("in breach of duty permits").	This provision targets defined office holders.	Yes.	Derivative liability (potentially also direct primary liability).	Subject to the same potential liability as the principal offender.
Officer in Default (UK Companies Act 2006)	Knowledge/intention ("authorises or permits"), the fault requirement proscribed under whichever doctrine of participation the prosecution is relying upon ("participates in"), or	Positive act ("authorises or permits"), the conduct requirement proscribed under whichever doctrine of participation the prosecution is relying upon ("participates in") or unreasonable omission ("failed to	Targets defined office holders ("director [...] or secretary"), provides for a managerial functions test ("any manager"), and provides for an officer functions test	No.	Derivative liability.	Subject to the same potential liability as the principal offender.

Model	Participant's Fault	Participant's Conduct	Scope of Participants to be Subject to Liability	Includes Evidential Burden Shifting Provision	Type of Liability	Potential Liability
	negligence ("failed to take reasonable steps to prevent").	take reasonable steps to prevent").	("treated as an officer").			
French Penal Code's accomplice provision	Knowledge (possibly including constructive knowledge).	Positive acts (including specific acts defined in the code).	General application.	No.	Secondary choate and inchoate liability.	Subject to the same potential liability as the principal offender.

Table 9.1 Different models of secondary or derivative liability

## D. Conclusions and Recommendations

### 1. Preferred Scheme of Derivative Corporate Managerial Agent Liability

9.288 The Commission acknowledges that both a generally applicable scheme of secondary criminal liability (the aids, abets, counsels or procures model)<sup>270</sup> and legislation or offence specific models of corporate officer derivative liability (officer in default<sup>271</sup> and consent connivance and neglect models)<sup>272</sup> already exist. However, the Commission is of the view that the introduction of a new statutory scheme is necessary in order to cater for the special nature of corporate managerial agents' complicity in corporate offending.

9.289 This proposed scheme targets the complicity of certain managerial agents who operate a required level of control or authority over the conduct of the corporate body and its agents. Where that control and authority is operated in a way that culpably contributes to corporate offending, this new scheme allows for the imposition of derivative criminal liability.

9.290 This proposed scheme allows for the effective application of derivative liability based upon the culpability and wrongful acts or omissions of corporate managerial agents who contribute to corporate offending, in circumstances in which it is uncertain or impossible to do so under current Irish law.

<sup>270</sup> Provided for by section 7 of the *Criminal Law Act 1997* and section 22 of the *Petty Sessions (Ireland) Act 1851*.

<sup>271</sup> Provided for by sections 270 and 270 of the *Companies Act 2014*.

<sup>272</sup> Examples of which can be found in section 80 of the *Safety, Health and Welfare at Work Act 2005* and section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

**R 9.01 The Commission recommends the enactment of a statutory scheme of derivative criminal liability (“the derivative scheme”) for managerial agents of corporate bodies (and which would also apply to the managerial agents of other prescribed undertakings) based upon such an agent’s culpable contribution to the substantive offending of that body (or undertaking).**

## **2. Who May be Made Liable under the Preferred Scheme**

9.291 The conduct element outlined in recommendation 12 allows for the imposition of derivative liability for a “wider” range of conduct than is possible in the generally applicable aids, abets, counsels or procures model. This is justified by limiting the persons on whom liability may be imposed under the scheme to corporate agents demonstrating a certain level of control or authority over the conduct of the corporate body.

9.292 In defining which agents should be subject to derivative liability under this scheme, the Commission favours the managerial functions-based test commonly found in consent, connivance or neglect provisions.

9.293 The Commission is of the view that the imposition of derivative liability under the recommended scheme is subject to a defendant satisfying such a functions-based test. The Commission is of the view that the provision found in section 80 of the *Safety, Health and Welfare at Work Act 2005* is a suitable example for the provision in this generally applicable scheme to be modelled on.

**R 9.02 The Commission recommends that a “managerial agent” should be defined as a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the corporate body; and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question; but not including a natural person who has simply been given the role of carrying out such policy-related operational authority.**

## **3. Fault-Based Offences**

9.294 This scheme is intended to be generally applicable.<sup>273</sup> That is, it is intended to allow derivative liability to be imposed upon a managerial agent in relation to that agent’s culpable contribution to any offending on the part of the corporate body. In this way, the recommended scheme is designed to mirror the range of offences to which the scheme of corporate criminal liability attribution recommended in Chapter 8 is applicable. This choice

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<sup>273</sup> This approach is favoured over the introduction of a scheme which allows for individual liability to be applied in relation to an exhaustive schedule of offences.

is made in recognition of the general potential for corporate managerial agents to be complicit in corporate crime.

9.295 In order to achieve this general applicability, this scheme must cater for the different types of fault that are found in substantive criminal offences: both subjective and objective.

9.296 The Commission acknowledges that other models of secondary and derivative liability considered in this chapter allow liability to be imposed based upon a range of different levels of culpability. However, both the consent, connivance and neglect model, and the officer in default model do this in a manner that fuses their fault and conduct requirements in one term, which is required to be interpreted by the courts. The Commission does not see the need for the fault and conduct elements of a derivative liability scheme to be provided for in a single descriptor. It is also undesirable to describe fault elements in terms that the courts must interpret as laying somewhere on the culpability hierarchy; which is the case for terms such as “consent”, “connivance”, “authorises” and “permits”.

9.297 The Commission is of the view that certainty in the law is best achieved by ensuring that the different levels of criminal culpability that appear in Irish criminal law are individually and expressly provided for, and that the fault and conduct elements of the scheme are provided for separately.

9.298 The recommended scheme provides that derivative liability may be imposed where a managerial agent contributes to corporate offending, with the following levels of culpability:

- (1) intention/knowledge;
- (2) subjective recklessness/wilful blindness;
- (3) gross negligence; or
- (4) simple negligence/constructive knowledge.

9.299 Though the scheme will cater for a full range of criminal culpability, in order for this scheme to avoid the criticisms of allowing for disparity of culpability and unfair labelling, the scheme requires that the level of fault required of a managerial agent should, in any particular prosecution under the scheme, track the level of fault required of the principal offender by the substantive offence in the case of subjective and objective fault based offences.

9.300 The Commission also acknowledges that though the various fault requirements listed in recommendation 9.05 represent a full range of criminal culpability, and are the most commonly used formulations of fault within the Irish criminal law, the criminal law does include fault requirements that fall outside of this list. In order for the recommended scheme to be truly generally applicable, it must be formulated to cater for substantive offences that have more unusual fault elements. In the case of such offences, the fault element that must be proved of the managerial agent will be the fault requirement listed

in recommendation 9.05 that most closely represents the level of culpability required by the substantive offence, without allowing liability to be imposed upon the managerial agent based upon a lower level of culpability. In so providing, the recommended scheme allows derivative liability to be imposed in these exceptional cases, without the agent suffering because of a disparity of culpability.

**R 9.03 The Commission recommends that the derivative scheme should provide that derivative liability may be imposed upon a managerial agent where that agent's culpability falls within the range of culpability of either subjective fault or objective fault (subject to recommendation 9.06 on the tracking requirement and recommendation 9.08 on strict liability and no fault liability offences).**

**R 9.04 The Commission recommends that the derivative scheme should be formulated so as provide for separate fault and conduct elements.**

**R 9.05 The Commission recommends that (subject to recommendation 9.06 on the tracking requirement) the derivative scheme should provide for derivative liability to be imposed where a managerial agent's culpable contribution to corporate offending is accompanied by one of the following fault elements:**

- (1) intention or knowledge;
- (2) subjective recklessness or wilful blindness;
- (3) gross negligence; or
- (4) simple negligence or constructive knowledge.

**R 9.06 The Commission recommends that the levels of fault required of a managerial agent in a specific case under the derivative scheme should track the level of fault that would be required of a principal offender in a prosecution for the substantive offence.**

**R 9.07 The Commission recommends that, in a prosecution under the derivative scheme, where the fault requirement of the substantive offence is not identical to one of those listed at recommendation 9.05, the level of fault which must be proved of the managerial agent should be the nearest equivalent that involves at the least a comparable level of culpability.**

#### **4. Strict and Absolute Liability Offences**

9.301 In circumstances where the substantive offending of the corporate body (or other prescribed undertaking) is strict or absolute liability in nature, the imposition of derivative liability must be provided for in a different manner than when dealing with fault based substantive offences.

9.302 Strict or absolute liability offences do not require proof of fault on the part of the corporate body. As such, there is no possibility of tracking a level of culpability required by a substantive offence onto the contributory conduct of the managerial agent. However, it



remains the case that managerial agents can conduct themselves in a manner which contributes to a corporate body's (or other prescribed undertaking's) commission of these forms of offences.

- 9.303 Defences to strict liability offences often require a defendant to demonstrate some specific state of affairs or conduct. Proving such a defence will have the effect of rendering the defendant's conduct that has satisfied the conduct element of the offence less morally blameworthy.
- 9.304 Under the recommended scheme, the managerial agent's liability does not flow from satisfying the conduct element of the substantive offence; rather, it flows from separate contributory conduct, to which a statutory defence may not relate.
- 9.305 An example of this is the defence to the strict liability offence of providing intoxicating liquor to a person under the age of 18 years.<sup>274</sup> A defendant shall have a defence if he or she can demonstrate that the liquor was provided following provision of an age card relating to the person under the age of 18. The state of affairs of having notice of an age card for the underage person removes the blameworthiness of the conduct element of the offence: having supplied intoxicating liquor to the underage person.
- 9.306 The managerial agent who is being tried in relation to his or her contribution does not have the same access to this defence as a defendant in a prosecution for the substantive offence. The managerial agent may have contributed to the conduct element of the offence without himself or herself having had an opportunity to require sight of an age card, for example, by failing to require that sales employees be trained to require production of an age card. For this reason, allowing the managerial agent access to only this defence would be unfair.
- 9.307 It is for this reason that the recommended scheme provides a managerial agent with a general defence in circumstances where the substantive offence is strict liability in nature. In such a prosecution, the obligation will remain on the prosecution to prove the commission of the substantive offence, and the managerial agent's contributory conduct. This defence can be accessed in two circumstances. Under the first option, the agent will have a defence where he or she can demonstrate that it was not part of his or her function as a managerial agent to operate control or authority over the corporate body in relation to the conduct element of the offence.
- 9.308 Thus, in the case of the offence of providing intoxicating liquor to a person under the age of 18 years, the managerial agent will have a defence where he or she can demonstrate that it was not part of his or her function to prevent the sale of intoxicating liquor to an underage person.

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<sup>274</sup> Section 31 of the *Intoxicating Liquor Act 1988*, as amended.

9.309 Under the second option, the managerial agent will have a defence where he or she can demonstrate that he or she performed her function as a managerial agent reasonably either in relation to his or her authority or control over the conduct of the corporate body, which satisfied the conduct element of the substantive offence; or in relation to the corporate body's failure to satisfy the statutory defence available to it.

9.310 Thus, in the case of the offence of providing intoxicating liquor to a person under the age of 18 years, the managerial agent may satisfy this by taking reasonable steps to ensure that intoxicating liquor is not sold to an underage person, and training and requiring staff to require production of an age card prior to selling a customer liquor.

**R 9.08 The Commission recommends that, where the substantive offence is a strict liability offence or an absolute liability offence, no proof of culpability will be required of a managerial agent in order to impose derivative liability (although the commission of the substantive offence, and the agent's contributory conduct, must still be proved), but an agent will have access to a defence where he or she can establish (to the evidential burden) that:**

- (1) he or she was not operating with authority or control in relation to the conduct of the corporate body, or its agents, which forms the basis of the conduct element of the substantive offence; or**
- (2) he or she acted reasonably in relation to the operation of his or her authority or control over the conduct of the corporate body, or its agents, as a managerial agent:**
  - a. in relation to the corporate body's commission of the conduct element of the substantive offence; or**
  - b. in relation to the corporate body's failure to satisfy any defence provided for in relation to substantive offence.**

## **5. The Conduct Element of the Preferred Scheme**

9.311 The intention of the recommended scheme is to attach criminal liability to managerial agents whose conduct and decisions have contributed to, or facilitated, the commission of an offence by the corporate body (or other prescribed undertaking). The blameworthiness of the agents targeted by this scheme, therefore, comes about due to the culpable contribution or facilitation. As such, under this scheme, proof of the commission of a substantive offence by a corporate body or undertaking is a condition precedent for the imposition of derivative liability, which forms part of the conduct element of the scheme. In this way, this scheme replicates the operation of the existing secondary and derivative liability schemes.

9.312 Though proof of the corporate body's offending will be a condition precedent for derivative liability, the scheme will not require proof of either a prosecution or conviction of the corporate body (or prescribed undertaking) for the substantive offence. Again, this

replicates the functioning of existing secondary and derivative liability models, as set out by the Supreme Court's judgment in *Hegarty*.<sup>275</sup>

**R 9.09 The Commission recommends that the commission of a substantive offence by a corporate body (or other prescribed undertaking) will be a necessary proof for the imposition of derivative liability to a managerial agent, which forms part of the conduct element of the recommended scheme.**

**R 9.10 The Commission recommends that proof of a prosecution or conviction of a corporate body (or other prescribed undertaking) for a substantive offence will not be required in order to impose derivative liability on a managerial agent under this scheme.**

9.313 Once the commission of the substantive offence is proved, the prosecution will also be required to prove the second part of the conduct element of the scheme. Where a managerial agent's culpable contribution to the substantive offending is proved, he or she shall be guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the substantive offence.<sup>276</sup>

9.314 In order to avoid the recommended scheme being under inclusive, the Commission is of the view that its conduct element must allow for derivative liability to be imposed based upon either positive acts or omissions that contributed to, or facilitated, the commission of the substantive offence.

9.315 Following the review of derivative liability models in this chapter, the Commission believes that the range of conduct that a derivative liability mechanism targeting managerial agents' culpable contribution to, or facilitation of, corporate offending should cover must include: agreement or approval of such offending; tacit agreement, or acquiescence to such offending; or failure to prevent such offending.

**R 9.11 The Commission recommends that the scheme shall provide that, upon proof of a managerial agent's culpable contribution to the substantive offending, a managerial agent shall be guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the substantive offence.**

**R 9.12 The Commission recommends that the derivative scheme shall provide that a managerial agent's culpable contribution to the substantive offending will be proved where the prosecution can demonstrate the following conduct on the part of the agent:**

- (1) positive acts of agreement to or approval of the substantive offending;**
- (2) tacit agreement or acquiescence to the substantive offending; or**

<sup>275</sup> *The People (DPP) v Hegarty* [2011] IESC 32.

<sup>276</sup> This is similar to the form of derivative liability imposed under section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

- (3) failing to prevent the substantive offending.

## 6. Inclusion of a Burden Shifting Provision

9.316 Under the recommended scheme, the imposition of derivative liability on managerial agents of corporate bodies (and other prescribed undertakings) is based on the agent's act or omission in exercising of their authority or control over the corporate body's decisions regarding its conduct, or in affecting those decisions. In proving its case, the prosecution will be required to access evidence in relation to the agent's authority or control, the exercise of that authority or control, and the relationship between an exercise of that authority or control and the commission of a substantive offence. Given the nature of corporate offending, and managerial agents' contribution to such offending, it is foreseeable that certain evidence essential to proving the prosecution's case may be hidden by organisational complexities, and such evidence may be peculiarly within the knowledge of the defendant, placing an onerous burden on the prosecution.

9.317 In addition, the recommended scheme differs from existing corporate/undertaking agent derivative liability models (the officer in default model - *Companies Act 2014* - and consent, connivance or neglect models), in its requirement that the fault of the agent track that required by the substantive offence (rather than giving the prosecuting entity some discretion as to the level of fault to require of a defendant). The Commission acknowledges that this will also add to the burden of a prosecuting entity in many prosecutions, when compared to existing models.

9.318 This reverse burden provision will contain the following elements:

- (1) A rebuttable presumption will be engaged once the prosecuting entity has satisfied a particular proof (to the satisfaction of the evidential burden);
- (2) The presumption will be that the managerial agent has satisfied both the fault element and the agent's contributory conduct aspect of the conduct element of the recommended scheme;
- (3) The managerial agent shall rebut the presumption where he or she can demonstrate a particular proof (to the satisfaction of the evidential burden).

**R 9.13 The Commission recommends that the derivative scheme should include a reverse evidential burden provision, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.**

**R 9.14 The Commission recommends that the reverse burden provision should include the following elements:**

- (1) **A rebuttable presumption will be engaged once the prosecuting entity has satisfied a particular proof (to the satisfaction of the evidential burden);**

- (2) The presumption will be that the managerial agent has satisfied both the fault element and the agent's contributory conduct aspect of the conduct element of the recommended scheme;**
- (3) The managerial agent shall rebut the presumption where he or she can rebut a particular proof (to the satisfaction of the evidential burden).**

**(a) Nature of the presumption**

9.319 The nature of the burden placed on the managerial agent by the reverse burden applicable to fault-based offences will be a presumption that the fault element of the recommended scheme will be satisfied and that the aspect of the conduct element that relates to the agents contribution to the substantive offence will be satisfied. The provision will not, however, include a presumption that the substantive offence upon which the derivative liability is to be based has been satisfied. The prosecution will still be required to prove this as a condition precedent of imposing liability.

9.320 In circumstances in which the substantive offence is a strict or absolute liability offence, a similar presumption may be raised. However, this will, obviously, not include a presumption of fault on the part of the managerial agent.

**R 9.15 The Commission recommends that, where the substantive offence is a fault based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that:**

- (1) the fault requirement of the derivative scheme has been satisfied; and**
- (2) the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence).**

**R 9.16 The Commission recommends that, where the substantive offence is a strict or absolute liability based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence).**

**(b) Engaging the presumption**

9.321 The means by which the recommended scheme's reverse burden provision will be engaged is modelled on the reverse burden provision found in section 80(2) of the *Safety, Health and Welfare at Work Act 2005*. As such, the presumption shall be engaged where the prosecution can demonstrate that the managerial agent was, at the material time, a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by it, whose duties included making decisions that, to a significant extent, could

have affected the management of the body (or undertaking), or a person who purported to act in any such capacity.

9.322 The scope of persons who may be subject to liability under the recommended scheme (as stipulated in recommendation 13) is also based upon section 80(2). As such, there is a legislative precedent that demonstrates the consistency of relying upon this form of presumption engaging mechanism for a reverse burden provision targeting the scope of persons outlined in recommendation 13.

9.323 The effect of using this presumption-engaging mechanism is to apply the presumption to the most responsible or influential category of agents to whom the recommended scheme can be applied. Managerial agents who are at the director level are a category of agent who will, generally, exercise the greatest level of power or control over the conduct of corporate body (or other prescribed undertaking) and its agents. This category of persons has a greater than usual level of responsibility over the conduct of the body (or undertaking). Where the body (or undertaking) conducts itself criminally, the fact of these agents' special level of responsibility is sufficient to ground the presumption that people within this category bear some of the blame for such criminality. Unless such an agent can undermine this blameworthiness with evidence, it is appropriate that they accrue derivative liability.

**R 9.17 The Commission recommends that the reverse burden provision shall be engaged where the prosecution can prove that the managerial agent in question was, at the material time, a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by the body (or undertaking) whose duties included making decisions that, to a significant extent, could have affected the management of the body (or undertaking), or a person who purported to act in any such capacity.**

**(c) Rebutting the presumption**

9.324 The requirement that is placed upon the managerial agent in order to rebut the presumption is also modelled upon section 80(2) of the *Safety, Health and Welfare at Work Act 2005*.

9.325 Under that provision, a defendant must provide evidence that he or she did not authorise or permit the commission of the substantive offence, or that the offence is not attributable to connivance or neglect on his or her part. As the recommended scheme does not provide for its fault and conduct element to be provided for in a single term (see recommendation 4 above), this mechanism to rebut the presumption cannot be adopted into the recommended scheme verbatim.

9.326 The effect of this element of section 80(2) is that the defendant will successfully rebut the presumption where he or she can provide some evidence that undermines either the fault or conduct element of the of the consent, connivance or neglect model provided in section 80(1). In mirroring the means of rebutting the presumption in section 80, the presumption provided under this scheme shall be rebutted where the substantive offence is a fault based offence and where the managerial agent can demonstrate that he or she

does not satisfy either the fault requirement which would be placed upon the prosecuting entity were the presumption not being relied upon, or the aspect of the conduct element of the scheme which relates to the agent's contribution to the substantive offence.

9.327 In circumstances in which the substantive offence is a strict or absolute liability offence, the obligation placed upon the agent in order to rebut the presumption will be confined to providing evidence that undermines the case that the agent, through his or her conduct, contributed to the substantive offending.

9.328 As the reverse burden provision does not include a presumption that the substantive offence has taken place, there is no need to provide evidence against this offence in order to rebut the presumption.

9.329 The reverse burden provision set out in the recommended scheme acts only to shift an *evidential* burden to a defendant. The Commission has included this form of burden shifting provision as it represents a proportionate response to the potential evidential difficulties that are the reason for including such a provision. Additionally, this type of burden shifting does not raise the same constitutional concerns as legal burden shifting provisions would.

**R 9.18 The Commission recommends that, in prosecutions under the derivative scheme where the substantive offence is a fault based offence, the presumption placed upon the managerial agent by the reverse burden provision shall be rebutted where the agent can demonstrate that he or she does not satisfy either:**

- (1) the fault element which the prosecuting entity would be required to prove, were the presumption not being relied upon, and, or in the alternative, as the case may be,**
- (2) the contributory conduct aspect of the conduct element of the derivative scheme.**

**R 9.19 The Commission recommends that, in prosecutions under the derivative scheme where the substantive offence is a strict or absolute liability offence, the presumption placed upon the managerial agent by the reverse burden provision shall be rebutted where the agent can demonstrate that he or she does not satisfy the contributory conduct aspect of the conduct element of the derivative scheme.**

**R 9.20 The Commission recommends that the derivative scheme should expressly provide that the presumption placed upon the managerial agent by the reverse burden will be rebutted where the requirements set out in recommendations 9.18 and 9.19 are proved by the managerial agent to the satisfaction of the evidential burden.**

## 7. Effect on Existing Legislation and Offence-Specific Models of Derivative Liability

9.330 The recommended scheme is designed to better cater for the special nature of corporate managerial agents' complicity in corporate offending than existing models of derivative and secondary liability.

9.331 As such, once this scheme is introduced, it will displace the use of consent, connivance or neglect provisions where they occur in statute. It will also displace the application of the aids, abets, counsels or procures model of secondary liability<sup>277</sup> in relation to its general application in all circumstances in which the primary perpetrator of an offence is a corporate body (or other prescribed undertaking), and the defendant is a natural person who falls within the scope of recommendation 13. In circumstances where the recommended scheme would not apply in any case, the aids, abets, counsels or procures model will continue to be applicable.

9.332 This scope of application of the recommended scheme will allow for a more appropriate means of imposing liability upon managerial agents for their complicity in the commission of corporate offences, to which the only complicity provision which currently applies is the aids, abets, counsels or procures model of secondary liability. Providing for the application of a single codified corporate managerial agent complicity provision will also increase legal certainty and improve the accessibility of law regarding the liability to be imposed for managerial agents in circumstances in which many subtly distinct consent, connivance or neglect provisions currently apply. Replacing these many provisions with the scheme outlined in these recommendations will also maximise the reduction of the risks of disparity of culpability and unfair labelling, for which these provisions are responsible.

9.333 Regarding the officer in default provisions contained in the *Companies Act 2014*, it is the view of the Commission that these provisions satisfy the 2014 Act's needs for the provision of derivative liability in an effective and integrated manner. The Commission is not of a view that the officer in default model should be replaced by a separate generally applicable statutory scheme of corporate managerial derivative liability, though this is a matter that may be considered by the Oireachtas in due course.

**R 9.21 The Commission recommends that the derivative scheme should replace existing "consent, connivance or neglect/wilful neglect" provisions where they occur in legislation.**

**R 9.22 The Commission recommends that the derivative scheme should also replace existing "aids, abets, counsels or procures" models of secondary liability for managerial agents, but limited to those cases where (a) the primary offender is a corporate body (or other**

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<sup>277</sup> Provided for by section 7 of the *Criminal Law Act 1997* and section 22 of the *Petty Sessions (Ireland) Act 1851*.



prescribed undertaking) and (b) the defendant is a natural person who falls within the scope of R 9.02.

**R 9.23** The Commission recommends that the derivative scheme shall not apply to, alter or affect, the application of the officer in default provisions of the *Companies Act 2014*.



## CHAPTER 10

# A DEFENCE OF DUE DILIGENCE

## A. Defining, satisfying and applying due diligence defences

### 1. Mechanics of a due diligence defence

10.01 Due diligence has been termed as a device by which the harshness of many corporate liability provisions is offset by allowing the corporate body or individual to show that the offence occurred despite reasonable steps being taken to ensure compliance.<sup>1</sup> The use of due diligence defences to avoid the conviction of those who are entirely blameless was summarised by Lord Reid in *Tesco Supermarkets Ltd v Natrass*<sup>2</sup> who stated:

“If the offence is held to be absolute that leads to the conviction of persons who are entirely blameless: an injustice which brings the law into dispute. So Parliament has found it necessary to devise a method of avoiding this difficulty... Parliament has chosen to deal with the problem piecemeal and has in an increasing number of cases enacted in various forms with regard to particular offences that it shall be a defence to prove various exculpatory circumstances. In my judgment the main object of those provisions must have been to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape conviction if they can show that they were in no way to blame.”

10.02 Due diligence can be described as an exculpatory form of liability. While due diligence is commonly used in Ireland as a defence in relation to statutory strict liability offences,

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<sup>1</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 148.

<sup>2</sup> [1971] 2 All ER 127, at 131.

other jurisdictions have also used due diligence as a trigger of liability<sup>3</sup> and as a factor in whether to exercise prosecutorial discretion,<sup>4</sup> and as a mitigating factor in sentencing.<sup>5</sup>

## 2. Requirements to Satisfy Due Diligence

10.03 Due diligence has been recognised as being a concept not susceptible of precise definition with much uncertainty concerning requirements necessary to satisfy the defence.<sup>6</sup> In order to avail of the due diligence defence, an accused is required to produce evidence of positive steps or actions taken in order to prove the absence of negligence. This generally means that a person, corporate body or undertaking must prove that they had taken all reasonable steps by setting up a system to prevent the action, which is the subject matter of the criminal act. Conformity with industry standards may provide some evidence of due diligence but may not be sufficient to demonstrate due diligence.<sup>7</sup>

10.04 An example of a “due diligence” defence can be found in section 78(1) of the *Consumer Protection Act 2007* which provides<sup>8</sup> that the accused may avail of a defence by establishing that: (a) the commission of the offence was due to a mistake or the reliance on information supplied to the accused or to the act or default of another person, an accident or some other cause beyond the accused’s control; and (b) the accused exercised due diligence and took all reasonable precautions to avoid commission of the offence. Aside from having to demonstrate something like mistake, a corporate defendant will need to produce evidence of the systems and procedures it had in place to avoid the commission of the offence, and that these included all steps that should reasonably have been taken to avoid its commission. The mere production of policies and procedures,

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<sup>3</sup> Section 2 of Chapter 9 of the Finnish Penal Code (743/1995), as amended by Act 61/2003, sets out that a corporate body will be liable for a criminal offence where “a person who is part of its statutory organ or other management or who exercises actual decision-making authority there [...] if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the” corporate body. See Donaldson and Watters, “Corporate Culture as a Basis for the Criminal Liability of Corporations”, prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, (Allens Arthur Robinson 2008) at 39.

<sup>4</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts*, “Appendix C, Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells” (No 195 2010) at 204. Wells notes that health and safety offences in England and Wales(?) are generally only prosecuted after other compliance mechanisms have failed.

<sup>5</sup> The United States Sentencing Commission provides that having an effective compliance and ethics program with which an organisation exercises due diligence to prevent and detect criminal conduct will act as a mitigating factor in the assessment of sentence. See: The United States Sentencing Commission, *2014 Guidelines Manual*, at chapter 8. Available at: <http://www.usc.gov/guidelines/2015-guidelines-manual/archive/2014-chapter-8>.

<sup>6</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 149.

<sup>7</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 2.96. See also: Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 154-155.

<sup>8</sup> This applies to a prosecution for an offence under the 2007 Act, other than under section 65(2).

without effective implementation, monitoring, communication and oversight, will not suffice.<sup>9</sup>

10.05 The requirements for demonstrating due diligence can be summarised as follows:

- (1) The implementation of a suitable system to ensure compliance (the fact that it has not prevented the breach does not necessarily mean it was unsuitable),
- (2) Adequate supervision and monitoring
- (3) Demonstrating that no reasonable precautions could have been taken.<sup>10</sup>

10.06 The fact that a due diligence defence can be concerned with the way that a corporate body manages its internal processes and risk exposure is demonstrated in the *Australian Criminal Code*, which provides:<sup>11</sup>

“Failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- a. inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- b. failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”

10.07 In order to avail of a due diligence defence, the act causing the offence must not have been intended or knowingly committed by the accused. It would be inappropriate to provide a defence for a corporate body that it “took all reasonable precautions to avoid commission of the offence”, but then maintain that it intentionally or knowingly committed the offending conduct in spite of those precautions. A due diligence defence therefore can apply only to an offence that does not require proof of intention or knowledge. Case law indicates that the standard of proof placed on an accused is an evidential burden of proof, rather than the legal burden of proof, which remains on the prosecution.

### 3. Different Formulations of the Due Diligence Defence

10.08 It is important to note that not all due diligence defences come in the same form. The Law Commission of England and Wales has recognised that there may be subtle linguistic

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<sup>9</sup> Cannon and Pegram, “A Costly Mistake” (2011) *New Law Journal*, at 1477 and 1478, discussing what is required to make out a defence under section 7 of the UK *Bribery Act 2010*, of having in place “adequate procedures” to prevent bribery by persons associated with a corporate body.

<sup>10</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph C. 97.

<sup>11</sup> Section 12.5(2) of the Australian Criminal Code.

differences that can, at least on the face of it, make some defences appear tougher to comply with than others.<sup>12</sup> In this jurisdiction, it has been demonstrated that as well as variations in the wording of due diligence type defences, such defences can also be varied through statutory limitations by the Oireachtas.<sup>13</sup> This section will explore some examples before considering the proposal for a general power to apply a due diligence defence later in the chapter.

**(a) Due diligence/all due diligence**

10.09 A definition of due diligence was set out by Lord Diplock in *Tesco Supermarkets Ltd v Nattrass*.<sup>14</sup> Lord Diplock stated:

"Due diligence is in law the converse of negligence...To establish a defence...a principal need only show that he personally acted without negligence...There is no injustice in requiring him to lay down a reasonably effective system (and) to show that he himself exercised due diligence to satisfy himself that such system was being observed."

10.10 In the same case, Viscount Dilhorne further clarified the measures required in order to satisfy the defence:

"That could not be established merely by showing that a good system had been devised and a person thought to be competent put in charge of it. It would still be necessary to show due diligence on the part of the accused in seeing that the system was in fact operated and the person put in charge of it doing what he was supposed to do."

10.11 Due diligence can therefore be defined as undertaking measures to ensure the proper operation of an effective system. In order to satisfy the defence, it would be necessary to provide evidence that the system was operating effectively at the time of the prohibited act being committed. This must include evidence as to the remedial action taken to address any issues arising. Relevant considerations in establishing due diligence would include:

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<sup>12</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph 6.27.

<sup>13</sup> *Waxy O'Connors Limited v Judge David Riordan* [2016] IESC 30.

<sup>14</sup> [1972] AC 153.

- (1) specific tasks allocated to specific personnel or role holders;
- (2) all activities and results recorded; all corrective action recorded and verified;
- (3) supervisory checks of the above.<sup>15</sup>

10.12 In order to satisfy the defence, the defendant must prove four related points:

- (1) that there was a system of controls;
- (2) which part of this system was relevant to the offence;
- (3) that this part of the system should have been adequate to prevent the offence;
- (4) that there is evidence to show that this part of the system was working properly on the occasion on which the offence was committed.<sup>16</sup>

**(b) Due diligence in all the circumstances**

10.13 The Law Commission of England and Wales made the case for a proposal that the courts should have the power to apply a defence of due diligence in all the circumstances to a statutory provision imposing criminal liability without a requirement for proof of fault.<sup>17</sup> If such a defence were applied to a statutory provision, the burden of proof would be on the defendant to show that he or she exercised due diligence in all the circumstances to avoid committing the offence.

10.14 The Law Commission of England and Wales has suggested that in order to accommodate the variations on the wording and strictness of the defence, and to give priority to securing the fairness objective, the courts should apply the defence most generous to the defendant.<sup>18</sup> It therefore proposed that the defence should be one of exercising due diligence in all the circumstances, rather than one of taking all reasonable precautions and exercising all due diligence, but sought views on whether the new defence, if introduced, should take a different, stricter form. Views were particularly sought on whether the defence, if introduced, should take the stricter form already found in some statutes, namely, did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence.<sup>19</sup> This clarifies that taking all reasonable precautions and exercising all due diligence is stricter than due diligence in all the circumstances.

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<sup>15</sup> Fidler, "The due diligence defence" (1998) 148 *New Law Journal* 328.

<sup>16</sup> Fidler, "The due diligence defence" (1998) 148 *New Law Journal* 328.

<sup>17</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph 6.1.

<sup>18</sup> *Ibid* at paragraph 6.50.

<sup>19</sup> *Ibid* at paragraphs 6.51 and 6.97.

**(c) All reasonable steps or precautions**

10.15 Reasonable steps or precautions have been defined as a system that is designed to prevent an offence occurring.<sup>20</sup> The use of “reasonable precautions” rather than “reasonable steps” is a slight variation in terminology on this form of due diligence defence that appears to have the same substantive effect.<sup>21</sup> Reasonableness must be considered in the light of the particular circumstances, but is to be viewed objectively.<sup>22</sup> It is what the ordinary person would regard as reasonable not what the defendant regards as reasonable.<sup>23</sup> The “all reasonable steps” or “all reasonable precautions” defence appears in many statutes, for example in section 271(2) of the *Companies Act 2014*, which provides:

“an officer is presumed to have permitted a default by a company unless the officer can establish that he took all reasonable steps to prevent it or that, by reason of circumstances beyond his control, he was unable to do so.”

10.16 In order to rebut a “reasonable steps” or “reasonable precautions” defence, a prosecutor must prove a causal link between the failure to take the reasonable steps and the act that constitutes the offence. In *Seaboard Offshore Ltd v Secretary of State for Transport*,<sup>24</sup> the House of Lords considered a company’s liability for an offence under section 31(1) of the *Merchant Shipping Act 1988*, which imposes on the owner of a ship a duty to take all reasonable steps to ensure that the ship is operated in a safe manner. Lord Keith of Kinkel stated that liability for such an offence is imposed by failure to take steps which by an objective standard are held to be reasonable steps to take in the interests of the safe operation of a ship.

**(d) “All reasonable steps or precautions” and “all due diligence”**

10.17 The defence of having taken all reasonable steps or precautions and having exercised all due diligence is formed through a combination of two of the previous defences. In order to satisfy this defence, a defendant must therefore prove two elements. The elements are distinct but related.<sup>25</sup> As already seen, reasonable steps or precautions refers to setting up a system. Due diligence is ensuring that the system is working as intended. To establish the defence, therefore, an appropriate system must have been put in place, there must have been effective measures or controls implemented to monitor the effective operation of the system and it must be demonstrated that the system was operating at the time the

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<sup>20</sup> Fidler, “The due diligence defence” (1998) 148 New Law Journal 328.

<sup>21</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph 6.34.

<sup>22</sup> Fidler, “The due diligence defence” (1998) 148 New Law Journal 328.

<sup>23</sup> *Ibid.*

<sup>24</sup> [1994] 1 WLR 541.

<sup>25</sup> Fidler, “The due diligence defence” (1998) 148 New Law Journal 328.



offence was committed. The Law Commission of England and Wales noted it as being the most common formulation of a due diligence defence in English and Welsh statutes.<sup>26</sup>

10.18 The distinction has also been recognised in this jurisdiction. In *Maguire v Shannon Regional Fisheries*,<sup>27</sup> the High Court (Lynch J) recognised the distinction between reasonable steps and due diligence in concurring with the reasoning of Lord Salmon in *Alphacell Ltd. v Woodward*<sup>28</sup> that section 2(1)(a) of the UK *Rivers (Prevention of Pollution) Act 1951*<sup>29</sup> required factory owners “not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it”<sup>30</sup> and in applying that reasoning to the offence under section 171 of the *Fisheries (Consolidation) Act 1959*.

#### **(e) Reasonable practicability**

10.19 The reasonable practicability defence applies where a risk existed but an employer did all that was reasonably practicable to reduce or avoid the risk. In order to satisfy the defence, the necessary protective and preventative measures must have been put in place to a reasonable extent, having assessed the risks to safety and health likely to result in accidents or injury at the place of work. The defence may not be satisfied where there is a disproportionate level of steps taken to mitigate a risk.<sup>31</sup>

10.20 An example of the defence of “reasonable practicability” is provided by section 2(6) of the *Safety, Health and Welfare at Work Act 2005*, which provides that “reasonably practicable”, in relation to the duties of an employer, is defined as:

“... An employer has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work.”

10.21 In the English case *Edwards v National Coal Board*,<sup>32</sup> Asquith LJ defined “reasonably practicable” as follows:

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<sup>26</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph 6.28.

<sup>27</sup> [1994] 3 IR 580.

<sup>28</sup> *Alphacell Ltd. v Woodward* [1972] AC 824

<sup>29</sup> This Act has since been repealed.

<sup>30</sup> *Alphacell Ltd. v Woodward* [1972] AC 824, at 848-849.

<sup>31</sup> [1949] 1 KB 704.

<sup>32</sup> *Ibid.*

“Reasonably practicable is a narrower term than “physically possible” and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them.”<sup>33</sup>

10.22 In *Baker v Quantum Clothing Group*,<sup>34</sup> Smith LJ in the English Court of Appeal considered the remarks of Asquith LJ and set out the process necessary to establish the defence as follows:

“First, the claimant must show that his place of work was not safe. If he achieves that, the burden passes to the employer to show that it was not reasonably practicable for him to eliminate the risk of harm. To avoid liability he has to show that the burden of eliminating the risk substantially outweighed the “quantum of risk”. When that forensic process is compared and contrasted with the process by which liability at common law is established, it is hard to understand how lawyers and judges have so often fallen into the error of thinking that there is no significant difference between the two.”<sup>35</sup>

10.23 Regarding the meaning of “reasonable” and “practicability” when taken together, Smith LJ stated that:

“...under the statute, the adjective “reasonably” serves only to qualify the concept of practicability. Reasonableness of conduct does not stand as the hallmark by which statutory liability is avoided as it does at common law. The focus of the defence by which liability is avoided, once it has been shown that the place of work was unsafe, is practicability – qualified by reasonableness. Under the statute, the employer must first consider whether the employee’s place of work is safe. If the place of work is not safe (even though the danger is not of grave injury or the risk very likely to occur) the employer’s duty is to do what is reasonably practicable to eliminate it. Thus, once any risk has been identified, the approach must be to ask whether it is practicable to eliminate it and then, if it is, to consider whether, in the light of the quantum of the risk and the cost and difficulty of the steps to be taken to eliminate it, the employer can show that the cost and difficulty of the steps substantially outweigh the quantum of risk involved. I cannot see how or where the concept of an acceptable risk comes into the equation or balancing exercise. I cannot see why the fact that a responsible or official body has suggested that a

<sup>33</sup> [1949] 1 KB 704, at 712.

<sup>34</sup> [2009] EWCA Civ 499.

<sup>35</sup> *Ibid* at 83-85.

particular level of risk is “acceptable” should be relevant to what is reasonably practicable. In that respect, it appears to me that there is a significant difference between common law liability where a risk might reasonably be regarded as acceptable and statutory liability where the duty is to avoid any risk within the limits of reasonable practicability.”<sup>36</sup>

10.24 Reasonable practicability has been considered in a number of Irish cases. In *Boyle v Marathon Petroleum (Ireland) Ltd*,<sup>37</sup> the plaintiff was an employee of the defendant and worked on an off-shore platform owned by the defendant. While working, the plaintiff was required to stoop, as the headroom was restricted due to a mid-floor, which had been installed for safety reasons. Due to the plaintiff being required to stoop and his helmet visor further impeding his vision, he was unable to see where he was going, and was injured as a result of striking his head on a girder, jerking his neck backwards and also twisting his knee when he fell, although the knee injury healed quickly. The plaintiff did not claim that the defendant was negligent but rather that it was in breach of its statutory duty under section 10(5) of *the Safety, Health and Welfare (Offshore Installations) Act 1987*, which provides that:

“It shall be the duty of an installation manager to ensure that every workplace on, in or in the neighbourhood of the offshore installation with which he is concerned is, so far as is reasonably practicable, made and kept safe.”

10.25 The High Court held that the place at which the accident occurred was as safe as reasonably practicable. The plaintiff argued on appeal that this finding was not supported by the evidence. The finding was upheld by the Supreme Court. In his judgment for the Supreme Court, O’Flaherty J. stated:

“I conclude that the learned trial judge reached the correct decision. I have no doubt that the onus of proof does rest on the defendant to show that it did what was reasonably practicable. I am also of the opinion that this duty is more extensive than the common law duty which devolves on employers to exercise reasonable care in various respects as regards their employees. It is an obligation to take all practicable steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the “agony of the moment,” for example, but that might not be enough to discharge his statutory duty under the section in question.”<sup>38</sup>

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<sup>36</sup> *Baker v Quantum Clothing Group* [2009] EWCA Civ 499 at 89.

<sup>37</sup> [1999] IESC 14; [1999] 2 IR 460.

<sup>38</sup> *Ibid* at 466.

10.26 The Supreme Court held that the onus of proof rested on the defendant to show that it did what was reasonably practicable, and that that duty was more extensive than the common law duty of employers to exercise reasonable care in respect of their employees. Since the statutory duty applied to every workplace, the defendant was entitled to balance the greater risk, which had been removed by the installation of the mid-floor, against the lower risk that had resulted in injury to the plaintiff.

10.27 In *Daly v Avonmore Creameries Ltd*,<sup>39</sup> McCarthy J differentiated the rules of negligence from the rules of reasonable practicability:

“I am not to be taken as supporting a view that, where lives are at stake, considerations of expense are any more than vaguely material. Where a danger is very rare, such considerations may be irrelevant. There is nothing rare about the danger of a man being killed in falling through, or from, a roof. I should add, further, that, in my view, the term “reasonably practicable” is not necessarily analogous to the use of the word reasonable in considerations of negligence at common law.”<sup>40</sup>

10.28 In *Warcaba v Industrial Temps [Ireland] Ltd & Ors*,<sup>41</sup> the High Court (Charleton J) highlighted that even apparently simple and straightforward work may carry the risk of an accident occurring. The Court held that such risk must be guarded against by reasonable measures that are practicable in the circumstances. Such reasonably practicable measures were outlined and included: guarding against hazards; issuing a warning (in the rare circumstances where a warning is sufficient); the provision of proper plant and equipment; training; insisting on the implementation of safety measures with appropriate discipline; and enforcing a sense of awareness as to what may occur should the procedures and precautions for avoiding accidents not be followed.<sup>42</sup>

#### 4. Due diligence defences in other jurisdictions

10.29 A due diligence defence is used in several other common law jurisdictions including Australia and Canada. In Australia, the defence is generally imposed by statute and is only available where it is expressly provided within the terms of the statute that imposes criminal liability.<sup>43</sup> In the absence of a fault element under the *Australian Criminal Code*, criminal responsibility is governed exclusively by the terms of the Code. A due diligence defence is therefore only available where the Code expressly provides it. The Code provides that a company may avail of a defence of due diligence. It can act to prevent the

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<sup>39</sup> [1984] 1 IR 131.

<sup>40</sup> *Ibid* at 147–148.

<sup>41</sup> [2011] IEHC 489.

<sup>42</sup> *Ibid* at 9.

<sup>43</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 149.

liability of a corporation for the conduct of a high managerial agent where it exercised due diligence to prevent the conduct at issue.<sup>44</sup> The Code also provides for a due diligence defence where an employee had a reasonable but mistaken belief that the conduct was not criminal:

“A body corporate can only rely on the defence of a mistake of fact if the employee, agent or officer of the corporation, who carried out the conduct, had a reasonable, but mistaken, belief that the conduct was not criminal. The corporation also needs to prove it exercised due diligence to prevent such conduct.”<sup>45</sup>

10.30 A company is required to demonstrate that it has exercised due diligence through the application of appropriate checks to ensure that it is conducting its business prudently and in compliance with legislation. However, the establishment of a system may not be sufficient to establish the defence of due diligence. The system must be “controlled, supervised, and updated”.<sup>46</sup> A defence of due diligence will not succeed if lack of due diligence is shown in inadequate corporate management, control or supervision of the conduct of its employees, agents or officers. The defence will also fail if there was a failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.<sup>47</sup>

10.31 In Canada, a due diligence defence has developed at common law since the decision of the Supreme Court of Canada in *R v City of Sault Ste. Marie*.<sup>48</sup> The defence is available for offences of ostensibly strict liability. In *R v City of Sault Ste. Marie*,<sup>49</sup> the Court held that for offences of strict liability, the accused could rely on a defence of due diligence where: (1) he or she reasonably believed in a mistaken set of facts which, if true, would have rendered the act or omission innocent; or (2) he or she took all reasonable steps to avoid the particular event. The second circumstance clearly sets out a general due diligence defence.

## 5. Application of Due Diligence Defences in Ireland

10.32 The Law Commission of England and Wales proposed that the courts should be given the power to apply a “due diligence in all the circumstances” defence (with the evidential burden on the defendant) to statutory offences that are, in whole or in part, silent on the question as to whether intention or knowledge (*mens rea*) is required for the defendant to be convicted. It suggested that the courts would only apply such a defence in

<sup>44</sup> *Australian Criminal Code Act 1995*, section 12.3(3).

<sup>45</sup> *Australian Criminal Code Act 1995*, section 12.5(1).

<sup>46</sup> Clough and Mulhern, *The Prosecution of Corporations* (OUP 2002) at 149.

<sup>47</sup> *Australian Criminal Code Act 1995*, section 12.5(2).

<sup>48</sup> 85 DLR (3d) 161.

<sup>49</sup> *Ibid.*

circumstances where it was appropriate to do so rather than in all cases. It sought views as to whether there were particular statutory offences which would not be able to avail of a general “due diligence” defence, for example road traffic offences.<sup>50</sup>

- 10.33 Gobert and Punch consider that there is no reason why the courts could not develop, using their common law powers, a general defence of “due diligence” which would exonerate a corporate defendant where the corporate body has acted in good faith and has made reasonable effort to identify and prevent the occurrence of the crime in question.<sup>51</sup>
- 10.34 In this jurisdiction, Keane J was prepared in the *Cavan County Council* case, discussed above, to read into the statutory offence in section 171 of the *Fisheries (Consolidation) Act 1959* a defence of “due diligence” even though this was not provided expressly by the offence.<sup>52</sup>
- 10.35 The submissions received by the Commission after the publication of the Issues Paper on this project generally, but not universally, were in favour of the provision of a due diligence defence in certain circumstances. These circumstances were not defined in detail but there was a considerable degree of acceptance that a defence of due diligence should not be available for a subjective fault based offence where the conduct was committed “knowingly or wilfully”. There was also general agreement that a due diligence defence is not appropriate where an offence is intended to be one of absolute liability.
- 10.36 One submission argues that public policy determines the circumstances and manner in which a due diligence defence should be allowed. A further submission argues that a general statutory defence of due diligence should be applied for strict liability corporate criminal offences. It would be inappropriate to apply a due diligence defence to a wide variety of offences with disparate culpability requirements. A further consideration is that the task of analysing existing statutory offences to determine whether a defence of due diligence should apply would be considerable in scale. It was argued therefore that the courts should be given the power to apply a defence of due diligence to statutory offences that lack a fault element in circumstances where it is deemed appropriate to do so.
- 10.37 Regarding the wording and definition of the defence of due diligence, one submission argued that the terms “due diligence” and “reasonable precautions” should not be

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<sup>50</sup> Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraphs 1.71-1.80. The Law Commission of England and Wales did not publish a final report on this issue, but has noted, “regulatory aspects of the proposals in the consultation paper have been implemented in part by the Government in its guidance to departments. The remainder of the proposals, which dealt with a small number of aspects of corporate liability, are on hold but we aim to deal with them as part of a full scale project on corporate liability in the future”. See: <http://www.lawcom.gov.uk/project/criminal-liability-in-regulatory-contexts/>.

<sup>51</sup> Gobert and Punch, *Rethinking Corporate Crime* (Butterworths 2003) at 101.

<sup>52</sup> *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, Keane J (dissenting).

defined in statute but rather left open to the court to deliberate. Another submission stated that an analysis of empirical data and detailed consideration of several other issues would be required in order to determine how the terms of the defence should be defined.

- 10.38 This report has identified common formulations of due diligence defences earlier in this section and recognises that certain formulations or variations may be appropriate for particular types of offences. Therefore, rather than recommending a general common formula for due diligence defences, the Commission recognises these common formulations of due diligence defences as a baseline and has concluded, and recommends, that due diligence defences should be drafted in a similar fashion ensuring consistency of defences for comparable offences where possible.
- 10.39 While the Commission does not recommend a generally applicable form of due diligence defence, it examines the application of due diligence defences to the failure to prevent model in detail later in the chapter and makes a specific recommendation regarding the appropriate form of due diligence defence for failure to prevent offences.
- 10.40 In order to avoid uncertainty in defining each variation of due diligence defence as discussed earlier in this section, the Commission also considers that where a regulator has jurisdiction in connection with a due diligence or comparable defence, the regulator should provide guidance, which may take the form of a statutory code, setting out measures to satisfy the due diligence defence.
- 10.41 The application of due diligence defences to both individual offending in a corporate context and corporate offending will be discussed in further detail later in the chapter.

## **B. Scope of Strict and Absolute Liability and Due Diligence Defences in Irish Law**

### **1. Constitutionally Permissible Scope of Strict and Absolute Liability in Irish Law**

#### **(a) Strict and absolute liability and the tripartite distinction**

10.42 Criminal offences can be grouped into three categories:

- (1) Fault-based offences: where the prosecution must prove (a) intent by the accused (that the offence was committed knowingly, intentionally or recklessly, called *mens rea*) and (b) that the accused committed the act constituting the offence (called the *actus reus*).

- (2) Act only offences, subject to a “reasonable precautions” or “due diligence” defence:<sup>53</sup> also called strict liability offences, where the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence, with the accused having a defence to the charge that he or she had acted “reasonably” or exercised “due diligence” to prevent the act occurring.
- (3) Act only based offences, not subject to any defence: also called absolute liability offences, where the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence, with the accused having no defence such as “due diligence”.

10.43 The tripartite distinction between offences requiring *mens rea*, those of strict liability and those of absolute liability was first recognised by the Supreme Court of Canada in *R v City of Sault Ste. Marie*.<sup>54</sup> Dickson J concluded his analysis as follows:

“I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two.

- (6) Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
- (7) Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed the mistaken set of facts, which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may properly be

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<sup>53</sup> A variation of an act only based offence with a “reasonable” or “due diligence” defence is an offence in which the prosecution is required to prove, in addition to the offending act, a negligence or unreasonableness based (objective) culpability element on the part of a defendant. This culpability element falls short of subjective knowledge or intention. An example of this type of offence is section 15 (15) of the *Criminal Justice Act 2011* which provides that person who “without reasonable excuse” fails or refuses to comply with an order under section 15 (to make available particular documents or documents of a particular description, or to provide particular information to An Garda Síochána) shall be guilty of an offence. See below for discussion in Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2013) at 170.

<sup>54</sup> (1978) 85 DLR (3d) 161.



called offences of strict liability. Mr Justice Esty so referred to them in *R v Hickey*, [1976], 29 CCC (2d) 23.

- (8) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.”<sup>55</sup>

10.44 Dickson J was of the opinion that public welfare offences would, *prima facie*, fall into the second category and were not subject to the presumption of full *mens rea*. An offence of that type, he said, would fall into the first category only if such words as “wilfully”, “with intent” “knowingly” or “intentionally” were expressly set out in the statutory provision creating the offence. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. He added:

“The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.”<sup>56</sup>

10.45 The tripartite distinction was first recognised in Ireland in *Shannon Regional Fisheries Board v Cavan County Council*,<sup>57</sup> in which Keane J, dissenting, engaged in a detailed analysis of the reasoning of Dickson J in *R v City of Sault Ste. Marie* and concluded that there should be an intermediate category of offences, which require only proof of the prohibited act and for which, a defence of due diligence would be available.

10.46 This recognition of an intermediate category of strict liability was endorsed by the Supreme Court in *CC v Ireland*.<sup>58</sup> Hardiman J in giving the judgment of the Court stated:

“On the existing jurisprudence and in particular the judgment of the Canadian Supreme Court in *R. v. City of Sault Sainte Marie* (1978) 2 S.C.R. 1299, and the dissenting judgment of Keane J. in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 IR 267, it might appear that a defence of due diligence would suffice to justify a regulatory offence of strict liability as Dickson J. used that term.”<sup>59</sup>

10.47 In the High Court decision *Reilly v Patwell*,<sup>60</sup> McCarthy J gave the following explanation of the tripartite distinction:

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<sup>55</sup> (1978) 85 DLR (3d) 161.

<sup>56</sup> *Ibid.*

<sup>57</sup> [1996] 3 IR 267.

<sup>58</sup> [2006] IESC 33; [2006] 4 IR 1.

<sup>59</sup> *CC v Ireland (No 2)* [2006] IESC 33; [2006] 4 IR 1.

<sup>60</sup> [2008] IEHC 446, McCarthy J.

‘As well as apparent, accordingly from the pleadings, and especially because of the reference to *R v City of Sault St Marie* [1978] 2 SCR 1299, *CC v Ireland* [[2006] 4 IR 1], and *Shannon Regional Fisheries Board v Cavan County Council* [[1996] 3 IR 267], the issue is whether or not offences may be divided into three classes, namely, those requiring *mens rea* in the traditional sense (usually so called “true crimes”) offences of strict liability in the sense used in those authorities i.e. offences where, in effect, the offence is made out *prima facie* by proof of the *actus reus* but that a defence is available to an accused of reasonable care or due diligence, and, thirdly, offences which may be described as absolute (i.e. where no defence is available and there is absolute liability once the *actus reus* [is proved]). Offences of strict liability in this sense would thus fall into the category of a “half-way house”, a term used by Professor Glanville William to describe them.’

10.48 The endorsement of the tripartite approach by the Supreme Court in *CC v Ireland*<sup>61</sup> was further acknowledged and followed by the High Court in *Minister for the Environment, Heritage and Local Government v Leneghan & Anor*<sup>62</sup> in holding that “[t]he Court is therefore obliged to entertain a number of different considerations in assessing whether the presumption of a regular *mens rea* element has been rebutted and to what extent”. The High Court then had regard to the list of relevant factors for determining the relevant category of liability set out in *Reilly v Patwell*,<sup>63</sup> as outlined above.

#### **(b) Strict and absolute liability**

10.49 The term strict liability can be said to feature in an offence where, in respect of one or more of an offence’s objective elements, the offender’s mental state is irrelevant. Accordingly, a strict liability offence is one in which for at least one aspect of its *actus reus*, no corresponding fault element or *mens rea* is required to be proved and there is no defence of mistake of fact available in respect of that objective element.<sup>64</sup>

10.50 The common law presumption of *mens rea* is that, when interpreting statutory offences, courts should presume that they contain mental fault elements. Unless in light of the words of the statute and subject matter of the offence, it is unambiguously clear that the legislature intends *mens rea* to be absent, the courts are to find it present. The presumption of *mens rea* has been described as is “in effect a presumption against strict liability”.<sup>65</sup>

<sup>61</sup> [2006] IESC 33; [2006] 4 IR 1.

<sup>62</sup> [2009] IEHC 226.

<sup>63</sup> [2008] IEHC 446.

<sup>64</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” (2011) 33 DULJ 285, at 286.

<sup>65</sup> Prendergast, “Strict Liability and the Presumption of *Mens Rea* after *CC v Ireland*” (2011) Ir Jur 46(1) at 212.

10.51 In the English case *Brend v Wood*,<sup>66</sup> Lord Goddard CJ emphasised the importance of *mens rea* in holding that:

“...it is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of the crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”<sup>67</sup>

10.52 However, strict liability has been imposed in this jurisdiction as a form of liability for those regulatory offences, which are based upon strong public policy justifications as, in the words of Lynch J in *Maguire v Shannon Regional Fisheries Board*,<sup>68</sup> such offences are not truly “of criminal character”.<sup>69</sup> Strict liability offences may be imposed on both corporate entities and individuals, and feature in statutory provisions such as the *Safety, Health and Welfare at Work Act 2005*.

10.53 The *European Court of Human Rights* (ECtHR) has held that there is nothing objectionable in principle with strict liability offences in the context of the *European Convention on Human Rights* (ECHR). In *Salabiaku v France*,<sup>70</sup> the Court stated that:

“As the government and the commission have pointed out, in principle the contracting states remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the contracting states may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the contracting states.”<sup>71</sup>

10.54 In contrast, an offence of absolute liability, in which due diligence or reasonable care is not a defence, involves imposing criminal liability solely on the basis of the act involved. Absolute liability is frequently confused with strict liability or, in some instances, is considered not to exist at all.<sup>72</sup> The Irish courts have recently used “absolute liability” to refer to an offence that dispenses with one or more fault elements and “strict liability”, as

<sup>66</sup> (1946) 62 TLR 462.

<sup>67</sup> *Brend v Wood* (1946) 62 TLR 462.

<sup>68</sup> [1994] 3 IR 580, at 589.

<sup>69</sup> *Maguire v Shannon Regional Fisheries Board* [1994] 3 IR 580, at 589.

<sup>70</sup> *Salabiaku v France* [1988] ECHR 19.

<sup>71</sup> *Ibid.*

<sup>72</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 2.59.

outlined above, to refer to a “halfway house” approach.<sup>73</sup> Absolute liability offences may also be imposed on both individuals and corporations.

10.55 In the English Court of Appeal decision *Re Odyssey (London) Ltd v OIC Run Off Ltd*,<sup>74</sup> Brooke LJ held that the presumption of *mens rea* could be displaced in stating that the judges always applied a presumption that orthodox principles of *mens rea* should be applied, but that they accepted that this presumption had to be displaced if the language of the statute permitted no conclusion other than that Parliament intended to impose absolute liability.

10.56 In Ireland, section 171(1) of the *Fisheries (Consolidation) Act 1959* provides that it is an offence to cause polluting material to be released into a river, and there is no express defence of due diligence to such a charge. It has been held that the object of the 1959 Act, to prevent river pollution, could be defeated if proof of intention or knowledge (*mens rea*) by the accused was required in such a case, or if the taking of reasonable precautions was a defence.<sup>75</sup> Similarly, section 343 of the *Companies Act 2014* provides that it is an offence to fail to file a company’s annual return by a specified date, and there is no express defence to plead that all reasonable precautions were in place to prevent this. To the same effect, the offences of exceeding a speed limit or illegal parking under the *Road Traffic Acts* (the most commonly prosecuted criminal offences, albeit summary offences and subject to fines and penalty points only) are not subject to a defence that, for example, the driver had taken reasonable precautions by driving within the speed limit or parking legally on the vast majority of occasions.

10.57 In *Reilly v Patwell*,<sup>76</sup> the High Court (McCarthy J) summarised the distinction between absolute and strict liability offences:

“...it should be said that the classification of an offence will depend upon its statutory terms and symmetry may not be possible. However, since the origin of the strict or absolute liability offence is the growth of legislative intervention from the middle of the 19th Century in the regulation of social conduct, it seems to me that in principle that is the aim and the purpose of the penalty (or application of the criminal law) in respect of regulatory matters is merely to enforce social control in a complex society and even if there is no meaningful sense in which a citizen chooses to be engaged in a given area which attracts such control, there is room for either offences of strict or absolute liability. I think in making the distinction, one can have regard, on the authorities, and in the light

<sup>73</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” 33 DULJ 285 (2011) at 286. *Reilly v Patwell* [2008] IEHC 446; *Minister for the Environment v Leneghan* [2009] IEHC 226; [2009] 3 IR 727.

<sup>74</sup> [2000] EWCA Civ 71.

<sup>75</sup> *Maguire v Shannon Regional Fisheries Board* [1994] 3 IR 580.

<sup>76</sup> [2008] IEHC 446.

of the approach which I have adopted that the following factors (though not exhaustive) are relevant.

- (1) The moral gravity of the offence.
- (2) The social stigma attached to the offence.
- (3) The penalty.
- (4) The ease (or difficulty) with which a duty is discharged or the law obeyed.
- (5) Whether or not absolute liability would encourage obedience.
- (6) The ease or difficulty with which the law might be enforced.
- (7) The social consequences of non-compliance.
- (8) The desideratum to be achieved when considering the statutes.”<sup>77</sup>

**(c) The constitutionally permissible scope of the use of strict and absolute liability**

*(i) Strict and absolute liability prior to CC v Ireland*

10.58 In *Maguire v Shannon Regional Fisheries Board*,<sup>78</sup> it was held that strict liability statutory offences were permissible in certain circumstances. Here, a pig farmer was convicted of causing deleterious matter to enter waters under section 171(1) of the *Fisheries (Consolidation) Act 1959*. Section 171(1) provides that “any person who...throws, empties, permits or causes to fall into any waters any deleterious matter, shall, unless such act is done under and in accordance with a licence granted by the Minister, be guilty of an offence under this section...”. The High Court (Lynch J) applied *Sherras v De Rutzen*<sup>79</sup> and held that, *prima facie* every offence, whether a common law offence or a statutory one, requires *mens rea*. It was held that this presumption of *mens rea* could in certain circumstances be displaced by clear statutory provisions in favour of strict liability. These circumstances were limited to three situations which could be strictly criminalised in this way:

<sup>77</sup> This distinction was followed by the High Court in *Minister for the Environment v Leneghan* [2009] 3 IR 727.

<sup>78</sup> [1994] 3 IR 580, at 589.

<sup>79</sup> *Sherras v De Rutzen* [1895] 1 QB 918. In *Sherras*, a publican was convicted of serving alcohol to a policeman on duty without the consent of the policeman’s superior. On appeal, the publican argued that he believed the policeman to be off-duty because he was not wearing an armband. His conviction was quashed. Wright J famously stated (at 921) that ‘[t]here is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence’.

- (a) acts which are not criminal in any real sense but which in the public interest are prohibited under a penalty;
- (b) some, and perhaps all, public nuisances; and
- (c) cases which, although criminal in form are really only a method of enforcing a civil entitlement.

10.59 The Court held that the section at issue was regulatory in essence and did not create an offence which would be regarded as of a truly criminal character.

10.60 The dissenting judgment of Keane J in the Supreme Court decision in *Shannon Regional Fisheries Board v Cavan County Council*<sup>80</sup> is particularly significant in recognising the existence of a tripartite distinction of liability and in particular, the applicability of strict liability offences in this jurisdiction. The case concerned the issue of whether or not the defendant County Council could avail of a “*mens rea*” defence on a water pollution charge. The majority in the Supreme Court (O’Flaherty and Blayney JJ) held that the question raised as to whether *mens rea* was a necessary ingredient in the offence, was not relevant to the issue, as *mens rea* had clearly been established. There was no doubt that the defendant County Council had deliberately discharged imperfectly treated sewage into waters and the fact that it had no alternative did not alter what it had done in point of law.

10.61 Keane J dissenting, engaged in a detailed survey of the jurisprudence on the issue, and considered the decision of the Supreme Court of Canada in *R v City of Sault Ste. Marie*,<sup>81</sup> in which, as already discussed above, Dickson J considered the question, whether there was some intermediate stage between the accepted principle of “ordinary” criminal responsibility (requiring *mens rea*), and the doctrine of absolute liability.<sup>82</sup>

10.62 Keane J then considered in further detail the judgment of Dickson J. in *R v City of Sault Ste. Marie*,<sup>83</sup> where Dickson J concluded that instead of two categories, there were three as follows: offences in which *mens rea* must be proved by the prosecution; offences in which it is not necessary to prove *mens rea* as proof of the act itself would be sufficient to impose liability leaving it open to the accused to avoid liability by proving that he took all reasonable care and offences of absolute liability where it is not open to the accused to avoid liability by showing that he was free of fault.<sup>84</sup>

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<sup>80</sup> [1996] 3 IR 267.

<sup>81</sup> (1978) 85 DLR (3d) 161.

<sup>82</sup> [1996] 3 IR 267, at 286-289 and 292.

<sup>83</sup> (1978) 85 DLR (3d) 161.

<sup>84</sup> [1996] 3 IR 267, at 287-288.

10.63 Dickson J concluded that public welfare offences would, *prima facie*, come within the second category, and were not subject to the presumption of full *mens rea*. An offence of that type, he held, fell within the first category (requiring full *mens rea*) only if words such as “wilfully”, “with intent”, “knowingly”, or “intentionally”, were contained in the statutory provisions creating the offence. Offences of absolute liability, in comparison, would be those in respect of which the legislature had made clear that guilt would follow proof, merely, of the prescribed act.

10.64 Keane J commented:

“Although the authorities speak of the legislature as having created offences of “strict liability” or “absolute liability”, it is important to bear in mind that the division of criminal offences into these categories has, in general, been the consequence of judicial decisions. In these circumstances, it seems to me that there is not much force in an argument which might otherwise have some appeal, i.e. that if the law is to develop in this area, it should be by parliamentary intervention rather than by court decisions. Since the doctrine of “strict liability” has been developed by the courts, there seems no reason why its further elaboration should not also be undertaken by judges rather than by the legislature. That was the view taken by Dickson J. and is one with which I would respectfully agree.”<sup>85</sup>

10.65 As regards offences of strict liability, which contain a “reasonable care” defence, Keane J warned that an observation of Lord Reid in the House of Lords in *Warner v Metropolitan Police Commissioner*<sup>86</sup> that “Parliament being sovereign, can create absolute offences if so minded”, is to be treated with caution in our jurisprudence, having regard to the guarantee in Article 38(1) of the Constitution, that “no person shall be tried on any criminal charge save in due course of law”.<sup>87</sup> He stated that it was necessary that the courts should consider with care, in every case where it was claimed that an offence had been created, whether the language used by the Oireachtas would justify a construction leading to a finding of absolute liability and whether it arose by necessary implication because of both the subject matter of the enactment and the nature of the penalty imposed.<sup>88</sup> This process of scrutiny should be carried out, he warned, having regard to the presumption of constitutionality that arose in the case of post-1937 statutes.

10.66 Keane J ultimately held that the presumption of *mens rea* can be displaced with particular reference to regulatory offences in stating that treating parking offences, for example, as involving moral culpability, would diminish that concept. Keane J concluded that the law

<sup>85</sup> [1996] 3 IR 267, at 289.

<sup>86</sup> [1968] 2 All ER 356, at 271.

<sup>87</sup> [1996] 3 IR 267, at 289.

<sup>88</sup> *Ibid* at 290.

should recognise an intermediate category of offences, which do not require full proof of *mens rea* and for which, the proof of the prohibited act is sufficient to satisfy the commission of the offence. A defence of due diligence would be available for such offences.

10.67 In *In re the Employment Equality Bill 1996*,<sup>89</sup> the Supreme Court addressed a question of vicarious liability rather than absolute or strict liability. Here, the Supreme Court considered an offence that imputed guilt to an employer, when committed by an employee, “whether or not it was done with the employer’s knowledge or approval”. The offence carried with it a fine of £15,000, or a prison sentence of up to 2 years, which were described by the Court as “potentially severe criminal sanctions”. Of relevance to the present discussion is the fact that regulatory offences were distinguished from ordinary offences. The Court found that the offence in this case was far from regulatory in nature, and a conviction, as Hamilton CJ held, would have attracted a high degree of social opprobrium. It was, therefore, an offence of absolute liability as an offence of high social opprobrium, where the conduct or state of knowledge of an accused employer was entirely disregarded.

10.68 Hamilton CJ stated that “[t]he social policy of making the Act more effective does not, in the opinion of the Court justify the introduction of so radical a change to our criminal law”. The Supreme Court held that insofar as it was constitutionally permissible to impose criminal liability on an employer for the acts of his employee, the offences in question should be essentially regulatory in character, apply where a person has a particular privilege or a duty to ensure that public standards as regards health or safety or the environment or the protection of the consumer are maintained, and where it might be difficult, invidious or redundant to seek to make the employee liable. The Supreme Court concluded that the Bill was repugnant to the provisions of the Constitution as the offences provided for in the Bill, for which the employer was sought to be made vicariously liable, were far from being regulatory in character but likely to attract a substantial measure of opprobrium and would make any purported trial not one held in due course of law. Although it is vicarious liability which is at issue in this case, it may be that the courts could refer to the Supreme Court’s reasoning here in finding that strict liability would also not be appropriate for offences of high moral opprobrium.

10.69 In circumstances where statutory provisions address an issue of social concern, the High Court held in *Gilroy v Gannon*<sup>90</sup> that strict liability was effective in order to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited acts.

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<sup>89</sup> [1997] 2 IR 321.

<sup>90</sup> [2002] 4 IR 439.



(ii) *Strict liability and absolute liability: CC v Ireland*

10.70 In *CC v Ireland*,<sup>91</sup> the Supreme Court considered whether a provision that criminalised and exposed a person, without any *mens rea* requirement, to a maximum sentence of life imprisonment was constitutionally valid. The Supreme Court held that the offence, under section 1(1) of the *Criminal Law (Amendment) Act 1935*, of unlawful carnal knowledge of a girl under the age of 15 years was unconstitutional because it was capable of labelling a “mentally innocent” person guilty of a serious offence. It was stated that the offence failed to respect the liberty and dignity of the individual, and constituted a failure by the State to vindicate the rights of a citizen to liberty and good name. Hardiman J stated:

“I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty of the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution.”<sup>92</sup>

10.71 It was also held that the right of an accused not to be convicted of a true criminal offence in the absence of *mens rea* was not qualified or limited by section 1(1) of the *Criminal Law (Amendment) Act 1935* but was wholly abrogated, and the imposition of this injustice on a discrete class of person was purportedly justified solely on the basis of its effectiveness as a deterrent.

10.72 However, the scope of the *CC* decision was limited to serious offences. The offence under section 1(1) of the *Criminal Law (Amendment) Act 1935* carried a maximum penalty of life imprisonment. The judgment did not call into question previous decisions such as those in *Maguire v Shannon Regional Fisheries Board*<sup>93</sup> and *Shannon Regional Fisheries Board v Cavan County Council*<sup>94</sup> where apparently harsh applications of a strict liability water pollution offence were justified by the courts, the water pollution offence being an example of a regulatory offence rather than a serious or truly criminal offence.<sup>95</sup> Hardiman J referred to the judgment of the Supreme Court of Canada in *R v City of Sault Ste. Marie* and the dissenting judgment of Keane J in *Shannon Regional Fisheries Board v Cavan County Council* in holding that a defence of due diligence may suffice to justify a regulatory offence of strict liability:

“On the existing jurisprudence and in particular the judgment of the Canadian Supreme Court in *R. v. City of Sault Saint Marie*, cited above and the dissenting judgment of Keane J. (as he then was) in *Shannon Regional Fisheries Board v Cavan County Council*, cited above, it

<sup>91</sup> *CC v Ireland* [2006] IESC 33; [2006] 4 IR.

<sup>92</sup> *CC v Ireland* [2006] IESC 33; [2006] 4 IR, at 80.

<sup>93</sup> [1994] 3 IR 580.

<sup>94</sup> [1996] 3 IR 267.

<sup>95</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” (2011) 33 DULJ 285, at 288.

might appear that a defence of due diligence would suffice to justify a regulatory offence of strict liability as Dickson J. used that term.”<sup>96</sup>

10.73 The Supreme Court’s decision recognised the distinction between offences that are absolute in nature, which afford absolutely no defence once the *actus reus* is established<sup>97</sup> and regulatory offences of strict liability, which can be justified by the application of a due diligence defence.<sup>98</sup> It could therefore be said that the Supreme Court recognised the tripartite distinction in holding that there are three categories of offences: a) ordinary offences where the State was obliged to prove *mens rea*, b) offences of absolute liability, where there was no such obligation, and c) an intermediary category of offences of strict liability, which freed the prosecution of having to prove *mens rea*, but afforded an accused an opportunity to prove that he had used all due diligence to avoid the criminal activity in question.<sup>99</sup>

(iii) *Strict liability and absolute liability: after CC v Ireland*

10.74 In *Reilly v Patwell*,<sup>100</sup> the High Court (McCarthy J) considered that Irish law now acknowledges the existence of the separate division of offences in the light of the Supreme Court’s decision in *CC v Ireland*. McCarthy J also held absolute liability offences to be constitutionally permissible.

10.75 McCarthy J held that an offence under section 6(4) of the *Litter Pollution Act 1997* was an offence of absolute liability. Section 6(4) provides that:

“Every occupier of land adjoining a public road in respect of which a built-up area speed limit or special speed limit has been established in the functional area of a local authority shall keep free from litter any footway adjoining the land and forming, or forming part of, a public road, and any area of land forming part of a public road between any such footway and the roadway.”

10.76 Section 6(6) provides that a person who contravenes any provision of section 6 is guilty of an offence. Section 24 of the *Litter Pollution Act 1997*<sup>116</sup> provides that a person guilty of an offence is liable on conviction on indictment, to a fine not exceeding €130,000, or on summary conviction, to a fine not exceeding €3,000.<sup>117</sup> The applicant was prosecuted in the District Court for failures to keep the pavements outside his bar clean of litter, despite warnings from the County Council. A judicial review was taken of the District Court judge’s decision to refuse to admit evidence of reasonable steps taken by the applicant to keep

<sup>96</sup> [2006] IESC 33; [2006] 4 IR, at 45.

<sup>97</sup> [2006] IESC 33; [2006] 4 IR, at 32.

<sup>98</sup> *Ibid* at 45.

<sup>99</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 54.

<sup>100</sup> [2008] IEHC 446.

the pavement clean. The provision did not provide for an express “due diligence” or “reasonable care” defence.

- 10.77 McCarthy J examined the issues and concluded that offences of absolute liability exist in Irish law, taking into account the fact that there was no penalty of imprisonment under the Act and the moral quality of the offence, which was in the nature of a “failure of civic virtue”. McCarthy J also found that there would be difficulties in the enforcement of the obligation under section 6(4) if the provision were not absolute in comparison to the ease of performance of the duty on the part of the applicant. It would be difficult to enforce as the Council would have to monitor the premises regularly to establish whether any reasonable care had been taken or any due diligence exercised. McCarthy J also took into account the fact that the aim of pollution laws was to support the social policy of achieving a “litter free” country.
- 10.78 In acknowledging that the tripartite approach had received endorsement from the Supreme Court in the decision of *CC v Ireland*,<sup>101</sup> the High Court in *Minister for the Environment, Heritage and Local Government v Leneghan & Anor*<sup>102</sup> noted that it was therefore obliged to entertain a number of different considerations in assessing whether the presumption of a regular *mens rea* element had been rebutted and to what extent.<sup>103</sup>
- 10.79 Having applied the principles set out in *Reilly v Patwell*,<sup>104</sup> the Court found that the offence under Regulation 4(3) of the *European Communities (Conservation of Wild Birds) (Owenduff/Nephrin SPA004098) Regulations 2005* must be one of strict liability.<sup>105</sup> The Court stated:

“While the moral gravity of the offence in question, and the social stigma attached thereto, might not be as severe as certain other offences on the criminal calendar, the relevant provisions undoubtedly perform an important regulatory function. The prohibition or limitation of grazing on Special Protection Areas is an important aspect of the State’s obligations under the environmental laws of the European Union. There is, without doubt, a pressing social and political interest in ensuring that legislative measures adopted in furtherance of these obligations are rigorously adhered to.”<sup>106</sup>

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<sup>101</sup> [2006] IESC 33; [2006] 4 IR 1.

<sup>102</sup> [2009] IEHC 226.

<sup>103</sup> *Ibid* at 18.

<sup>104</sup> [2008] IEHC 446.

<sup>105</sup> [2009] IEHC 226, at 19.

<sup>106</sup> *Ibid*.

10.80 Furthermore, the High Court found that if a *mens rea* element was read into the provisions, they would be impossible to enforce. The Court stated:

“The profound difficulty in demonstrating beyond reasonable doubt a conscious intention, or even subjective recklessness, on the part of a farmer in respect of the grazing activities of his livestock becomes obvious from even the most rudimentary application of ordinary common sense.”<sup>107</sup>

10.81 Hedigan J also refused to accept the respondents’ argument that the imposition of strict liability would afford an unfair advantage to the appellant in prosecuting such offences. Hedigan J stated that the 2005 Regulations are very clear in delineating the conduct which they prohibit. He stated that there is no serious difficulty in compliance and no significant areas of uncertainty. In support of his conclusions in this regard, Hedigan J referred to the presumption that the trial judges who come to consider such prosecutions will act fairly and will vindicate the rights of accused persons.<sup>108</sup>

10.82 The constitutionally permissible use of strict liability for regulatory offences was recognised by the Supreme Court in *Waxy O’Connors Ltd v Riordan*.<sup>109</sup> The offence in this case, of which the applicant company had been convicted, was one of strict liability, and came within the category of offences that deal with social and public welfare matters. In such cases, the law may often provide for a due diligence defence. It was found that the provision does not come within the absolute liability category as the provision provides for a defence.<sup>110</sup>

10.83 In recognising the constitutionally permissible scope of strict liability for regulatory offences of a public welfare nature, the Supreme Court stated:

“It can be readily acknowledged that what is in question here is an offence of a “regulatory character”. It is truly a “public welfare” question. Though enforced as a penal law through the utilisation of the machinery of the criminal law, we are dealing here with “a liquor offence”. This is a matter which pre-eminently falls to be “regulated” by statute.”<sup>111</sup>

10.84 The Supreme Court held that for strict liability offences of a regulatory nature, it is not necessary for the court to “read in” a broader *mens rea* provision in order to render the provision constitutionally valid. MacMenamin J stated:

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<sup>107</sup> *Ibid* at 20.

<sup>108</sup> [2009] IEHC 226, at 21.

<sup>109</sup> [2016] IESC 30.

<sup>110</sup> *Ibid* at 32.

<sup>111</sup> *Ibid* at 46.

“I am not persuaded that in this context, in an offence of this type, a court is faced with a situation where it must “read in” a broader mens rea provision so as to render the provision constitutionally valid.”<sup>112</sup>

10.85 MacMenamin J stated that the point was, whether the section and sub-section can withstand scrutiny in a manner consonant with Article 38.1 of the Constitution. In holding that the delimiting of the defence of due diligence in the amended provision was constitutional, MacMenamin J stated:

“It is not unconstitutional for the legislature, in the case of this offence in this category, to proportionately delimit the defence of reasonable care or due diligence to a certain specified minimum standard. It is not possible to conceive of lesser means or measures whereby this desirable end, engaging common good considerations, could otherwise be achieved. There cannot be any doubt that under age drinking is a serious social problem with a wide and long-term impact on society as a whole. The common good requires that the law be structured and applied in a manner which achieves the end of preventing what is an undesirable practice; which may affect the health and wellbeing of young people, as well as those affected by the conduct of such young people who engage in drinking to excess. What is laid down is, to my mind, a proportionate legislative means of achieving that end.”<sup>113</sup>

(iv) *The constitutionality of strict liability after CC v Ireland*

10.86 Prendergast doubts that the Constitution puts, and should put, the use of strict liability off limits to the Oireachtas.<sup>114</sup> The decision of the Supreme Court in *CC*, in which it held that the absolute liability offence of unlawful carnal knowledge to be unconstitutional, was strongly criticised in the 2007 *Report of the Criminal Law Rapporteur for the Legal Protection of Children*.<sup>115</sup> The Report stated that the reasoning in *CC* may have been over-determined by the assumption that the defendant’s behaviour was morally neutral, meaning that he lacked any degree of moral blameworthiness, as it focused on the fact that the sexual encounter between the accused and the complainant was consensual and appeared to have been initiated by the complainant, rather than on the risk involved in having sexual intercourse with such a young girl.<sup>116</sup> The Report highlighted the existence in Irish law of strict liability for non-regulatory strict liability offences of a serious nature; it emphasised the role that strict liability has played as a core component of the law of

<sup>112</sup> *Ibid* at 50.

<sup>113</sup> [2016] IESC 30, at 61.

<sup>114</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” (2011) 33 *DULJ* 285, at 285.

<sup>115</sup> McAuley, *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (Government Publications 2007).

<sup>116</sup> *Ibid* at paragraph 3.46.

murder and as a feature of the crime of manslaughter.<sup>117</sup> The judgment in *CC* may give the impression that strict liability in serious offences is to be regarded as *prima facie* unconstitutional.<sup>118</sup> However, it has been noted that the absence of constitutional challenges to other serious offences such as causing death by dangerous driving<sup>119</sup> raises an element of doubt.<sup>120</sup> Arguably, the cases since *CC* in which the superior courts have upheld the application of strict liability in serious offences outside of the area of statutory rape also serve to raise a doubt as to the unconstitutionality of strict liability.<sup>121</sup>

10.87 *The People (DPP) v Power*<sup>122</sup> concerned the offence of possession of a controlled drug with a market value of €13,000 or more for the purposes of sale or supply contrary to section 15A of the *Misuse of Drugs Act 1977*.<sup>123</sup> The maximum sentence that can be imposed for this offence is life imprisonment and it also carries a presumptive minimum sentence of 10 years.<sup>124</sup> The Supreme Court held that there was no requirement to prove *mens rea* in respect of the objective element of the value of the drugs and thus liability in this regard was strict.

10.88 In *O'Connor v O'Neill*,<sup>125</sup> the High Court (Hanna J) applied a 2003 High Court decision<sup>126</sup> in identifying section 13 of the *Road Traffic Act 1994* as involving strict liability for the offence of refusing or failing to provide breath specimens and held it to be constitutionally valid.

10.89 In *The People (DPP) v O'Shea*,<sup>127</sup> the Supreme Court held that the offence of careless driving in section 52 of the *Road Traffic Act 1961*, as substituted, does not require proof of intention or recklessness. Careless driving, as reconstituted in 2011, is a serious offence as it is punishable on summary conviction by a fine of up to €5,000, and where the careless driving causes death or serious harm to another person, it is indictable and punishable by a fine of up to €10,000 and imprisonment for up to two years. The Supreme Court clarified that while the offence of careless driving is not one of absolute liability, there is no requirement to prove that the driver intended to drive carelessly. However, in charging the jury, the trial judge outlined various driving offences and referred to exceptions to the

<sup>117</sup> *Ibid* at paragraphs 3.19-3.24.

<sup>118</sup> Prendergast, "The Constitutionality of Strict Liability in Criminal Law" (2011) 33 *DULJ* 285, at 285.

<sup>119</sup> Section 53 of the *Road Traffic Act 1961*.

<sup>120</sup> Prendergast, "Strict Liability and the Presumption of Mens Rea after *CC v Ireland*" (2011) 46(1) *The Irish Jurist* 211, at 219.

<sup>121</sup> Prendergast, "Strict Liability and the Presumption of Mens Rea after *CC v Ireland*" (2011) 46(1) *The Irish Jurist* 211, at 219.

<sup>122</sup> *People (DPP) v Power* [2007] *IESC* 31.

<sup>123</sup> As inserted by section 4 of the *Criminal Justice Act 1999*.

<sup>124</sup> *Misuse of Drugs Act 1977*, section 27(3A)-(3C), inserted by section 5 of the *Criminal Justice Act 1999*.

<sup>125</sup> *O'Connor v O'Neill* [2011] *IEHC* 118.

<sup>126</sup> *DPP v Behan*, High Court (Ó Caoimh J) 3 March 2003.

<sup>127</sup> [2017] *IESC* 41.

presumption of *mens rea* or mental fault for a small number of strict liability offences. The judge referred to the section 52 offence as a strict liability offence. The defendant was successful on appeal to the Court of Appeal in overturning his Circuit Court conviction. On appeal to the Supreme Court, the DPP sought clarity regarding the correctness of the trial judge's charge in excluding the mental elements of recklessness and intention, but did not defend the references to strict liability and therefore conceded that there were inaccuracies in the judge's charge. The Supreme Court accepted that the judge's charge to the jury was incorrect in using the term "strict liability", however, the Court significantly corrected the Court of Appeal's analysis and held that the defendant was liable for the offence of careless driving, as outlined above.

10.90 O'Malley J stated that a requirement of mental guilt for the offence of careless driving would be incompatible with the case law on gross negligence manslaughter and dangerous driving in that it would have the effect of elevating the *mens rea* requirement for the less serious careless driving offence over that of the more serious offences.<sup>128</sup> O'Malley J also asserted that if a person's driving intended to cause death or serious injury, murder would be the appropriate charge, not a driving offence, and that recklessness as "knowingly taking an unjustified risk" is irreconcilable with carelessness as "failure to pay sufficient attention or to take due care".<sup>129</sup> It has been suggested that the influence of *CC v Ireland*,<sup>130</sup> with its narrative that strict liability, or more accurately absolute liability, is open to constitutional challenge, has led to the acceptance on the part of the DPP and the Supreme Court that describing careless driving as strict liability rendered the judge's charge defective.<sup>131</sup> Arguably, the judge's use of strict liability is consistent with much academic and judicial usage of "strict liability" as applying where *mens rea* does not need to be established for one or more *actus reus* elements.<sup>132</sup> The judge's use would also apply to careless driving, as described in the Supreme Court's explanation of the culpability requirements. It could be argued that the trial judge's statement could be incorrect only if strict liability is understood as what is known as "absolute liability".<sup>133</sup> The significance of the Supreme Court's judgment is that without using the term "strict liability", it was held that the offence of careless driving, as an offence that is not absolute in nature but for which there is no requirement to prove that the driver intended to drive carelessly, is constitutionally permissible despite the offence being serious in nature and essentially of one strict liability.

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<sup>128</sup> [2017] IESC 41, at 41.

<sup>129</sup> *Ibid* at 45-46.

<sup>130</sup> [2006] IESC 33; [2006] 4 IR.

<sup>131</sup> Prendergast, "Culpability in Careless Driving and the So-called 'Third Category' of Criminal Offence" (2018) 36(4) *ILT*, at 63-67.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*.

10.91 With regard to non-serious offences, the Supreme Court in *CC* held that an offence with an objective fault element such as carelessness but that also carried a defence of due diligence appeared to be constitutionally permissible for regulatory offences. In *Reilly v Patwell*,<sup>134</sup> the High Court held the tripartite distinction of offences to be applicable in this jurisdiction and in doing so, recognised the applicability of strict liability offences post-*CC*. Strict liability offences were described as “offences where, in effect, the offence is made out *prima facie* by proof of the *actus reus* but that a defence is available to an accused of reasonable care or due diligence.”<sup>135</sup> The constitutionality of the tripartite distinction was also recognised by the High Court in *Minister for the Environment, Heritage and Local Government v Leneghan & Anor*<sup>136</sup> in holding that the public welfare offence in question was one of strict liability. And, the Supreme Court in *Waxy O’Connors Ltd v Riordan*<sup>137</sup> held a regulatory offence to be one of strict liability to which a defence of due diligence was applicable:

“I would hold, consequently, that this offence is one of strict liability, which frees the prosecution from having to prove the totality of *mens rea*, but nonetheless affords an accused an opportunity to prove, on establishing the necessary evidential ingredients, that *due* diligence had been exercised in the context of the regulated activity in question.”<sup>138</sup>

10.92 The Supreme Court held the strict liability offence to be constitutional even where the due diligence had been limited by the Oireachtas in pursuit of a social aim.<sup>139</sup>

10.93 Prendergast concludes that *CC v Ireland* does not provide a persuasive explanation of how strict liability can be unconstitutional but adds that *CC* strongly expresses the notion that strict liability should not be used in serious offences and is likely to deter such use.<sup>140</sup> However, the use of strict liability, without it being termed as such, for an offence of moral opprobrium in *The People (DPP) v O’Shea*<sup>141</sup> indicates that the Supreme Court may be willing to apply strict liability despite the lingering influence of the decision in *CC*.<sup>142</sup> Although *CC* may have some impact in largely restricting express applicability to regulatory offences, it could be concluded that the Supreme Court’s second *CC* decision has not, as the above cases demonstrate, led the courts to significantly alter their approach to criminal offences of strict liability. The case analysis acknowledges that the decision in *CC*

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<sup>134</sup> [2008] IEHC 446.

<sup>135</sup> *Ibid* at 15.

<sup>136</sup> [2009] IEHC 226.

<sup>137</sup> [2016] IESC 30.

<sup>138</sup> *Ibid* at 55.

<sup>139</sup> *Ibid* at 61.

<sup>140</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” (2011) 33 DULJ 285, at 318.

<sup>141</sup> [2017] IESC 41.

<sup>142</sup> [2006] IESC 33; [2006] 4 IR.



may have gone too far and that the courts continue to rely on a more practical approach towards offences of strict liability. The ambiguity which surrounded the use of strict liability no longer presents an issue as the courts have clearly indicated that the use of strict liability offences with the application of a due diligence defence is constitutional.

**R 10.01 The Commission recommends that, having regard to the relevant constitutional provisions, a due diligence type defence should apply to strict liability offences.**

## **2. Economic Analysis of Benefits and Use of Absolute and Strict Liability**

### **(a) Certainty of the law**

10.94 The strict liability model can be considered economically advantageous as it reduces risk of liability by providing certainty as to the law, acting as a deterrent and encouraging greater vigilance on the part of those in a position to prevent the commission of the prohibited act.<sup>143</sup> Keane J noted in *Shannon Regional Fisheries Board v Cavan County Council*<sup>144</sup> that an offence to which a due diligence did not apply would seem to put the accused in the position of carrying on the particular activity at its peril highlighting the importance of ensuring certainty as to the law as provided by the availability of a due diligence defence. It was further remarked that in the case of one of the country's principal industries, agriculture, it would seem to follow, if that were indeed the law, that some farming activities could never be carried on, since it would never be open to the farmer to argue that he had taken all reasonable steps in his power to dispose of the slurry or other potentially polluting material. This would undoubtedly have significant economic repercussions. Keane J also noted that aside from the special position of local authorities and other bodies with statutory responsibilities, the absence of a due diligence defence would seem to encourage laxer standards on the part of potential polluters. It was acknowledged that since, in the absence of a due diligence defence, the factory owner or farmer would know that the expenditure of time and money on the taking of appropriate measures is going to avail him nothing, there is the likelihood that some at least would simply disregard the law or take at best inadequate precautions, as the alternative would be going out of business. The existence of an intermediate category of strict liability to which a defence of due diligence applies is therefore significantly important in ensuring certainty as to the law in conducting business and ensuring effectiveness of the law in promoting vigilance and compliance.

10.95 In *Waxy O'Connors Ltd v Riordan*,<sup>145</sup> the effectiveness of strict liability, even when where a limited due diligence defence applies, was demonstrated as the amendment of the

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<sup>143</sup> *R. v Warner* [1969] 2 AC 256, at 271 and *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1. See also: Keane J's dissenting judgment in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267.

<sup>144</sup> [1996] 3 IR 267.

<sup>145</sup> [2016] IESC 30.

relevant statutory provisions to provide for a single delimited due diligence defence was aimed at targeting issues in implementing the pre-regulatory regime.<sup>146</sup> The High Court held that even the application of strict liability to a regulatory offence, where the due diligence defence was limited by statute, was both certain and straightforward. It allowed certainty as to the law in carrying out business and was effective to enforce as it made the decision as to whether or not to sell, deliver, supply or permit the consumption of intoxicating liquor a simple one; one more open and less likely to cause individual offence to customers.<sup>147</sup> It was stated that the limitation of a due diligence defence does not necessitate that an accused is automatically found guilty, but rather, identifies *when* the action of sale of intoxicants is lawful within a range of activity which is regulated for the common good.<sup>148</sup> If there were a lack of certainty around when an activity such as the sale of intoxicants was lawful, businesses could be disincentivised to carry on such activities as the risk of liability for prohibited acts could be too great. Such a strict liability provision is therefore efficient and effective as it provides certainty to businesses thereby incentivising the continuation of relevant economic activities.

10.96 In contrast, the use of absolute liability would be ineffective for serious offences, as it would not promote compliance. The Supreme Court has held that treating offences as essentially offences of absolute liability where the offences attract high social opprobrium is inappropriate.<sup>149</sup> The application of absolute liability to an offence of high social opprobrium, as well as posing constitutionality issues, would be ineffective, as it would not serve to deter prohibited conduct by providing an incentive through a strict liability due diligence defence to ensure that all reasonable steps are taken to prevent the prohibited act.

## **(b) Efficiency and effectiveness**

### *(i) Efficiency in attributing liability and incentivising compliance*

10.97 It is argued that strict liability is an efficient model of liability attribution as it incentivises compliance and good governance. Shavell argues that if parties are held strictly liable for harm, they will generally be led to choose the socially desirable level of care and the socially desirable level of scrutiny (perhaps this could be equated to reasonable steps and all due diligence) to avoid liability.<sup>150</sup> Arguably, for parties to have socially correct incentives to take precautions and to engage in activities, they must escape liability for harms that they do not cause.<sup>151</sup> This is, therefore, an argument in favour of the use of

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<sup>146</sup> *Ibid* at 2.

<sup>147</sup> *Ibid* at 31.

<sup>148</sup> [2016] IESC 30, at 53.

<sup>149</sup> [1997] 2 IR 321.

<sup>150</sup> Shavell, *Foundations of Economic Analysis of Law* (2004) at 250.

<sup>151</sup> *Ibid* at 250.

strict liability with a defence of due diligence as parties will not be held liable where they can prove that all due diligence was exercised in order to prevent the harm.

10.98 Shavell also argues that if a firm is liable when it is not the cause of losses, it will have an excessive incentive to spend on care which may be inappropriate, as if a firm is unable to prevent the prohibited act by taking care then it may be forced to discontinue any activity with any level of risk of causing the prohibited acts.<sup>152</sup> This could possibly be likened to the economic disadvantage of the use of absolute liability for serious non-regulatory offences. It is also argued that under a negligence model of liability, individuals or firms plainly would not take more care than due care, because they will escape liability by taking merely due care. Taking greater care would therefore be to no advantage yet would involve additional costs.<sup>153</sup> This could be contrasted with the strict liability model of attribution under which individuals or firms are incentivised to exercise the socially optimal level of care or all due diligence to ensure that they escape liability. Accordingly, governance and compliance systems and controls may be more rigorous and harm may be lessened where offences are treated as those of strict liability.

(ii) *Efficiency of prosecution*

10.99 Strict liability is generally a more efficient model of liability from the perspective of efficiency of prosecution as there is no need for a prosecutor to prove an intention on behalf of a defendant to commit a criminal act nor is it necessary to prove that a defendant acted negligently or recklessly. The reverse burden due diligence provision also ensures that the evidential burden rests on the defence. This is more efficient as it would be much more difficult for the prosecution to prove facts which are peculiarly within the knowledge of the defence. The strict liability model therefore lessens the burden on the prosecution.

10.100 In *Waxy O'Connors Ltd v Riordan*,<sup>154</sup> the effectiveness of strict liability, even where the applicable due diligence defence is limited, was demonstrated as the amendment of the statutory provisions to provide for a single delimited due diligence defence was aimed at targeting the issues in implementing the pre-regulatory regime.<sup>155</sup> MacMenamin J stated that the availability of a limited form of due diligence defence ensured the effective and just operation of the law in pursuit of a public aim:

“There is no impermissible incursion on the judicial function. Rather, what is in question is a proportionate narrowing of parameters, where the defence provided for may be relied on in order that the

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<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid* at 179-180.

<sup>154</sup> [2016] IESC 30.

<sup>155</sup> *Ibid* at 2.

regulatory legislation designed to meet a public good operates in an effective and just manner.”<sup>156</sup>

10.101 MacMenamin J went on to state that the common good requires that the law be structured and applied in a manner which achieves the end of preventing what is an undesirable practice; which may affect the health and wellbeing of young people, as well as those affected by the conduct of such young people who engage in drinking to excess. He concluded that the relevant provision was a proportionate legislative means of achieving that end.<sup>157</sup>

10.102 Absolute liability can be an efficient model of liability for regulatory offences of a non-serious nature as such offences would be difficult or disproportionately costly to prosecute if they were not treated as offences of absolute liability. The High Court held that an offence under the *Litter Pollution Act 1997* would be considerably difficult to enforce if it were not absolute and there would also be significant social consequences to widespread non-compliance.<sup>158</sup> It was also held that it was not the case that the imposition was so great as to discourage any occupier of a premises from discharging it.<sup>159</sup>

(iii) *Exception to the effectiveness argument*

10.103 A possible exception to the effectiveness argument may be offences of high moral opprobrium. In *In re the Employment Equality Bill 1996*,<sup>160</sup> the Supreme Court held that vicarious criminal liability should not apply where an offence is one of high opprobrium as the social policy of rendering the Act more effective does not justify such a radical change to the criminal law. The Court stated that the imposition of vicarious liability would be disproportionate to the mischief with which the legislation sought to deal, which was to provide equality of access to employment. It was, essentially, an offence of absolute liability in an offence of high social opprobrium, where the conduct or state of knowledge of an accused employer was entirely set to one side in the analysis. The Court held it would be unjust, irrational, inappropriate and contrary to the Constitution to taint a defendant with guilt for offences which are far from being regulatory in character but are more likely to attract a substantial measure of opprobrium. It is therefore important to note that such an exception to the effectiveness argument may therefore be inapplicable to regulatory offences. It is also noteworthy that the case concerned vicarious liability rather than strict liability.

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<sup>156</sup> *Ibid* at 55.

<sup>157</sup> *Ibid* at 61.

<sup>158</sup> *Reilly v Patwell* [2008] IEHC 446.

<sup>159</sup> *Ibid* at 54.

<sup>160</sup> [1997] 2 IR 321.

**(c) Economic and cost efficiency**

10.104 In enacting an offence of strict liability, it is certainly arguable that account should be taken of any additional costs that may be involved, against the anticipated benefits of the more efficient application of the criminal law and improved corporate governance. In a 2017 consultation paper on *Corporate Liability for Economic Crime*, the UK Ministry of Justice acknowledged that costs of expanding the strict liability *failure to prevent* model would include those arising from the need for companies to understand the new law and any associated guidance, to make adjustments to corporate governance, to assess the risk of economic crime and to implement measures across their operations to mitigate them.<sup>161</sup> However, the additional benefits should also be weighed against existing deterrents and an assessment conducted of the overall benefits and risks to the economy of making any change.<sup>162</sup> The introduction of section 7 of the UK *Bribery Act 2010* had generated concerns that the implementation of the reform and the associated principles of adequate procedures, as set out in the Ministry of Justice guidance, would involve additional costs for business. It was anticipated that it may have negative economic impacts in that it would pose a disproportionate burden on small and medium sized enterprises (SMEs).<sup>163</sup> However, the UK Ministry of Justice and Department of Business, Innovation and Skills jointly commissioned research in 2014 into the impact of the *Bribery Act 2010* among exporting SMEs, and the survey results suggested that the Act was neither impeding exports nor imposing disproportionate burdens on SMEs.<sup>164</sup>

**(d) Conclusion**

The analysis above has demonstrated that the use of strict and absolute liability can be economically advantageous. Strict liability provides certainty as to the law, which acts as a deterrent, encourages greater vigilance in corporate practices and incentivises economic activity in areas which may otherwise be deemed too risky. Strict liability is also efficient in attributing liability and incentivising compliance while both strict and absolute liability are efficient in terms of prosecution. Experience from the UK indicates that strict liability is also cost efficient.

**R 10.02 The Commission recommends that the suitable use of strict liability offences is consistent with and can contribute to effective and efficient regulation.**

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<sup>161</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 18.

<sup>162</sup> *Ibid.*

<sup>163</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 21.

<sup>164</sup> *Ibid* at 21, fn 41.

### 3. Use of Strict and Absolute Liability and Due Diligence Defences in Irish Law

#### (a) Strict and absolute liability: rationale and usage in Irish law

10.105 Strict and absolute liability offences are exceptions to the general rule that the criminal law will not seek to impose liability upon a person who is not either morally blameworthy, or in some other way at fault, for some criminal conduct or result. Three of the main arguments in favour of maintaining these exceptions are that:

- (1) they are needed on policy grounds for the maintenance of public welfare;
- (2) their application is generally confined to areas of activity which require a voluntarily assumption of risk, which justifies the imposition of liability upon a person who assumed that risk should it become manifest; and
- (3) requiring proof of fault in certain circumstances would in effect render the criminal law ineffective.<sup>165</sup>

10.106 One further argument is that the imposition of strict or absolute imposition of liability may serve to deter people from offending due to the likelihood of being held accountable for prohibited acts. The arguments of public welfare or social consequences, difficulty of proof and deterrence are outlined in further detail below.

#### (i) *Public welfare or social interest*

10.107 Public welfare is a frequently cited social goal, arguing that the State has a duty to protect its citizens, and one method of doing this is to make it easier to convict those who cause, threaten or risk harm with a view to preventing the perpetrators from causing further harm and deterring others from engaging in similarly prohibited acts.

#### (ii) *Difficulty of proof*

10.108 Proving fault, particularly *mens rea*, invariably causes difficulties for the prosecution. Imposing liability by way of absolute or strict liability appears to be an attractive option for prosecutors seeking to overcome the difficulty of attributing criminal intent to a company.<sup>166</sup> If liability is absolute or strict then there would be no need for a prosecutor to prove an intention by a defendant to commit a criminal act nor would it be necessary to prove that a defendant acted negligently or recklessly. A prosecutor would simply need to

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<sup>165</sup> McMullan and Ó Toghda, *Criminal Law* (Round Hall 2012) at 69.

<sup>166</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 2.57.

show that an individual or company through the acts of its employees or agents committed an offence of absolute or strict liability.<sup>167</sup>

(iii) *Deterrence*

10.109 It is often suggested that a crime will have greater deterrent value if liability is strict or absolute as people will realise that they should any possibility of committing certain prohibited acts for fear of conviction and punishment.

**(b) Absolute Liability**

10.110 Among the arguments against absolute liability offences are that the principle of *nulla poena sine culpa* (no punishment without fault) ought to be invoked, requiring proof of fault before criminal liability can be proven. However, the courts have held that some existing absolute liability offences are constitutional where they are enacted in the interest of public welfare, where it would require disproportionate resources to prove the offence and where such offences may act as a deterrent to offending. The Law Commission of England and Wales has acknowledged that there may be some contexts in which too much of the courts' time would be taken up by vain attempts to persuade the courts to apply a due diligence defence to offences under the relevant legislation. It might be better from the outset to say that the defence simply has no application to some offences, such as those created by road traffic legislation, and possibly other legislation.<sup>168</sup> In the Supreme Court of Canada decision in *R v City of Sault Ste. Marie*,<sup>169</sup> Dickson J referred to the arguments advanced in justification of the use of absolute liability in public welfare offences and pointed out that two predominated. First, there was the argument that the protection of social interests required a high standard of care and attention on the part of those who engaged in particular activities and that such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The second argument was based on administrative fault as it was too great a burden in time and money to place upon the prosecution. He also referred to the argument that slight penalties are usually imposed and that conviction for breach of a public welfare offence "does not carry the stigma associated with conviction for a criminal offence".<sup>170</sup>

10.111 It was accepted by Lord Diplock in *R v Warner*<sup>171</sup> and Lord Scarman in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*<sup>172</sup> that a primary objective of treating an

<sup>167</sup> *Ibid.*

<sup>168</sup> The Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at 130.

<sup>169</sup> (1978) 85 DLR (3d) 161.

<sup>170</sup> (1978) 85 DLR (3d) 161, Dickson J, as discussed in *Shannon Regional Fisheries Board v Cavan County Council*.

<sup>171</sup> *R v Warner* [1969] 2 AC 256, at 271.

<sup>172</sup> [1985] AC 1.

offence as one of strict liability is to encourage greater vigilance on the part of those in a position to prevent the commission of the prohibited act.

10.112 In an Irish context, the High Court (Lynch J) gave the following explanation of the rationale for absolute liability offences in *Maguire v Shannon Regional Fisheries Board*:<sup>173</sup>

“If proof of *mens rea* were required in these sorts of cases it would be very difficult ever to establish an offence. I venture to query whether the appellant would have spent £200,000 on his piggery feed system were it not for a perception by him of grave penalties to be incurred at his peril if there should be an escape of whey into the river.”<sup>174</sup>

10.113 Lynch J’s explanation expresses a twin rationale identified in equivalent cases in other jurisdictions.<sup>175</sup> The first rationale is ease of prosecution: a fault requirement such as intention, recklessness, or negligence in respect of the causing of pollution is likely to be the most difficult thing for the prosecution to prove; dispensing with it, and any scope for a defence of reasonable care or due diligence, aids efficiency and enforcement of the regulatory scheme.<sup>176</sup> The second rationale is the provision of an incentive to persons, who may risk the prohibited harm or consequence, not merely to take some steps to guard against pollution for the sake of being able to cover themselves in the event of pollution, but to not let pollution happen at all.<sup>177</sup>

10.114 The efficacy of parking and speeding offences under the *Road Traffic Acts* or the offence of failure to file a company’s annual return under the *Companies Act 2014* would be undermined by the availability of a defence. The policy underlying absolute liability offences was discussed by the High Court (Sullivan P) in *M’Adam v Dublin United Tramways Company Ltd*,<sup>178</sup> which was a prosecution for the offence of overloading a tram under the *Dublin Carriage Act 1953*. In finding that the prohibition contained in the 1953 Act were absolute, Sullivan P stated that the object of the absolute liability offence was to protect the public against the danger that may result from the overloading of an omnibus, and that object could be achieved only by the absolute prohibition of transporting more than a limited number of passengers, and by penalising the owner for any breach of such prohibition, irrespective of the owner’s knowledge of such a breach.

10.115 It can be argued that due to the danger to the public, which can result from certain types of conduct, it is appropriate to punish that conduct regardless of whether the conduct was

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<sup>173</sup> *Maguire v Shannon Regional Fisheries Board* [1994] 3 IR 580.

<sup>174</sup> *Ibid* at 589.

<sup>175</sup> *Alphacell v Woodward* [1972] AC 824.

<sup>176</sup> Prendergast, “The Constitutionality of Strict Liability in Criminal Law” (2011) 33 DULJ 285, at 308.

<sup>177</sup> *Ibid*.

<sup>178</sup> [1929] IR 327, at 333.



intended. In *Shannon Regional Fisheries Board v Cavan County Council*,<sup>179</sup> Keane J stated that the enactment of some offences as absolute liability offences would not conflict with fundamental constitutional principles, and he offered offences such as illegal parking and speeding under the *Road Traffic Acts* as examples.<sup>180</sup>

10.116 In *Reilly v Patwell*,<sup>181</sup> the High Court found that an absolute liability offence of littering under the *Litter Pollution Act 1997* was constitutional as it would be considerably difficult to enforce the offence if it were not absolute and there would also be significant social consequences to widespread non-compliance. McCarthy J stated:

“It seems to me that there would be considerable difficulties in the enforcement of the obligation if it were not absolute: if and insofar as it might be found by, say, a litter warden that rubbish was strewn about on the relevant portion of pavement (e.g. cigarette butts) it would prima facie be impossible to know whether or not any reasonable care had been taken or due diligence exercised. If one were to test whether or not that had been the case one would presumably need to watch the premises over a period or make an increased number of visits thereto. The social consequences of widespread non-compliance are significant in as much as this civic obligation on any view seems to be a significant element in application of the policy of achieving a “litter free” country: no one could doubt but that if each business premises kept the pavement in front thereof clean (as not only happened here before the Act but happens widely on the European mainland) it would be a significant step, towards that desideratum.”<sup>182</sup>

10.117 McCarthy also held that it was not the case that the imposition was so great as to discourage any occupier of a premises from discharging it (on the basis that no matter what he might do or what expense he might incur, he is at risk of breach) having regard to the ease of compliance, and, of course, the discharge of one’s civic duty (even if it is enforced under penalty) is something which can legitimately be imposed upon anyone.<sup>183</sup>

### (c) Strict Liability

10.118 In line with the Supreme Court’s judgment in *CC v Ireland*,<sup>184</sup> it appears that it would not be constitutionally permissible to use absolute liability for serious offences that have a high degree of moral opprobrium. However, the Supreme Court in *CC v Ireland* recognised that absolute liability with a defence of due diligence (that is, strict liability, as outlined in

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<sup>179</sup> [1996] 3 IR 267.

<sup>180</sup> *Ibid.*

<sup>181</sup> [2008] IEHC 446.

<sup>182</sup> *Ibid* at 53.

<sup>183</sup> [2008] IEHC 446, at 54.

<sup>184</sup> [2006] 4 IR.

the tripartite distinction in Keane J's dissent in *Shannon Fisheries* discussed above) may be appropriate for regulatory offences.

10.119 In *Minister for the Environment, Heritage and Local Government v Leneghan & Anor*,<sup>185</sup> the High Court acknowledged the existence of the tripartite distinction of offences and found that strict liability offences were constitutionally permissible with particular reference to offences which pursue social or public welfare interests. It was stated:

“There is, without doubt, a pressing social and political interest in ensuring that legislative measures adopted in furtherance of these obligations are rigorously adhered to.”<sup>186</sup>

10.120 Strict liability offences also secure fairness as the defence of due diligence enables defendants, who have taken all reasonable steps to prevent an offence, to escape liability. The Law Commission of England and Wales has stated that unlike the presumption of fault (*mens rea*), strict liability with a due diligence defence can secure the fairness objective in a way that is sensitive to the difference between the capacities and resources of defendants to organise their affairs in such a way that offences are not committed in the course of business.<sup>187</sup>

10.121 Strict liability also promotes good governance as the availability of a due diligence defence incentivises corporations to implement systems of governance and control as well as supervisory mechanisms to monitor the effective operation of such systems.

10.122 Examples of statutory provisions for strict liability offences can be seen in the *Companies Acts* and in health and safety legislation. An example of such a provision is section 271(2) of the *Companies Act 2014* which provides that an officer shall be presumed to have permitted a default by the company unless the officer can establish that he took all reasonable steps to prevent it or that, by reason of circumstances beyond his control, was unable to do so. Further, several offences under the *Safety, Health and Welfare at Work Act 2005* are offences of strict liability.

#### **(d) The applicability of due diligence defences**

10.123 It is arguable that the scope of the use of due diligence defences is limited to certain categories of offences. Offences that require proof of intention, knowledge or recklessness involve proof of a mental element or *mens rea* as well as performance of a proscribed act in order for liability to be attributed to an accused person. Given that it must be proved that an accused either intended to commit, or knowingly or recklessly

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<sup>185</sup> [2009] IEHC 226, at 19.

<sup>186</sup> [2009] IEHC 226, at 19.

<sup>187</sup> The Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at 112.

committed an offence, the availability of a defence that would allow an accused to argue that all due diligence was exercised to prevent the offence would be wholly inappropriate.

10.124 The nature of absolute liability offences is that they are prosecuted on proof of performance of a prohibited act alone without the availability of any defences. The scope of the use of due diligence defences does not, therefore, extend to absolute liability offences. The efficacy of parking and speeding offences under the *Road Traffic Acts* or the offence of failure to file a company's annual return under the *Companies Act 2014* would be undermined by the availability of a due diligence defence. In *Reilly v Patwell*,<sup>188</sup> it was held that a defence of due diligence would not be appropriate for a regulatory offence of absolute liability under the *Litter Pollution Act 1997* as the availability of a defence would render the offence ineffective as in order for the local authority to establish whether the defendant was exercising due diligence, it would have to conduct regular inspections of the exterior of the premises such that enforcement would not be practicable.

10.125 Although arguments exist in favour of absolute liability offences, and the Oireachtas continues to enact some such offences, it is at least arguable that a due diligence defence may be suitable for some offences that are currently absolute in nature. The application of a due diligence defence to such offences could also mitigate the constitutional difficulties discussed by Keane J, dissenting, in *Shannon Regional Fisheries Board v Cavan County Council*.<sup>189</sup> Keane J noted that the existence of a due diligence defence may also encourage the development of effective corporate compliance policies. In addition, Keane J noted that absolute criminal liability may discourage good corporate preventative and compliance policies, as those with management responsibility may well consider that the resources involved in such measures should not be put in place because, under an absolute liability offence, such measures will not avail the corporate body any defence. In that respect, absolute criminal liability may be damaging to good corporate standards or improvements in standards of care, which is typically the general object of much of the legislation with which this report is concerned, notably legislation on financial services and economic regulation. One of the submissions received suggested that the legislature may decide to provide due diligence defences in respect of certain absolute liability offences, however, it advised that "extreme caution" should be taken in recommending the introduction of such a defence.

10.126 The scope of the usage of due diligence defences centres on strict liability offences and particularly on offences of a regulatory nature. Keane J, dissenting, in *Shannon Regional Fisheries Board v Cavan County Council*<sup>190</sup> concluded that the law should recognise an intermediate category of offences for which proof of the prohibited act alone is sufficient

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<sup>188</sup> [2008] IEHC 446.

<sup>189</sup> [1996] 3 IR 267.

<sup>190</sup> *Ibid.*

to satisfy the commission of the offence and that defence of due diligence would apply to such strict liability offences.

10.127 The due diligence defence often acts as a defence to strict liability environmental, health and safety and consumer offences. For example, sections of the *Consumer Protection Act 2007* provides for a due diligence defence. The Act prohibits corporate bodies from engaging in unfair, misleading or aggressive commercial practices, and also provides that engaging in any such practice is a criminal offence. Section 55(1)(y) of the 2007 Act prohibits a corporate body from creating an impression with a consumer, such as in an advertisement, that after-sales services are available when they are not. Section 56 provides that contravention of this prohibition is an offence. This is an act-only offence because it is not necessary for the prosecution to prove that the trader intended to mislead a consumer; it is sufficient that a misleading impression has resulted from the trader's advertisement. Section 78 of the 2007 Act provides that it is a defence to any prosecution under section 55(1)(y) of the 2007 Act if the accused proves that it "exercised due diligence and took all reasonable precautions to avoid commission of the offence."

#### **(e) Imposing limitations on due diligence defences**

10.128 Although the availability of a due diligence defence may be required in order to render serious strict liability offences constitutionally permissible, such due diligence defences may be limited by the Oireachtas. The Supreme Court decision in *Waxy O'Connors Ltd v Riordan*<sup>191</sup> concerned the amendments made to the Intoxicating Liquor Act 1988 by the *Intoxicating Liquor Act 2000* concerning the sale of alcoholic drinks to underage persons in licensed premises. The intent behind the 2000 Act was to place an added onus on licensees of public houses to take appropriate measures to prevent this social problem. In cases of doubt, licensees or their staff were to require a young person to produce an age card. Proof of production of the card would be the single defence on a charge of sale or allowing sale of alcoholic drink to under age persons.

10.129 Section 31(4) of the *Intoxicating Liquor Act 1988* had provided for a due diligence defence to the offences. Two forms of defence were provided for in the original section 31(4) which meant that until the 1988 Act was amended in 2000, a licensee prosecuted on a charge of permitting another person (such as a staff member) to sell or deliver intoxicating liquor on licensed premises could avail of the following defences; (a) that the young person had produced an age card relating to himself/herself to the person who supplied the intoxicating liquor, or (b) that the person who supplied the alcohol to the under age person had other "reasonable grounds" for believing that the customer was over 18 years of age. The standard of proof on the licensee in either case was on the balance of probabilities.<sup>192</sup>

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<sup>191</sup> [2016] IESC 30.

<sup>192</sup> [2016] IESC 30, at 10-11.

- 10.130 However, section 14(1)(b) of the *Intoxicating Liquor Act 2000* amended section 31(4) of the Act of 1988 so as to re-define the available defence. The question that arose is whether, in limiting the defence, the Oireachtas strayed into unconstitutionality. The key difference between the 1988 Act and the 2000 Act was that the 2000 Act expressly defined the precise nature of the one defence to be available, and the limits of the evidence of due diligence which could be raised in evidence. Under the amended provisions, a licensee must show at trial, on the balance of probabilities, that the young person had produced an age card to the staff member who served or delivered the intoxicating liquor. That this was both the intent and effect of the 2000 Act is confirmed by contrast with the plain words of other provisions of the Intoxicating Liquor Code, which provided for less serious offences, where the “due diligence” or “reasonable ground” defences remained.<sup>193</sup>
- 10.131 The appellant claimed that the respondent judge should have construed section 31(4) of the 1988 Act, as amended by the 2000 Act, so as to allow for the defence of due diligence, as in the case of other offences. The argument was also made that if section 31(4) of the 1988 Act did not allow for such form of defence, the provision under which the appellant was convicted is invalid, being repugnant to Article 38.1 of the Constitution on the basis that it was an offence of absolute liability, and that a trial on such a charge is not a trial in due course of law.<sup>194</sup>
- 10.132 The High Court judge rejected the appellant’s submission in holding that section 31(4) was inconsistent with Article 38.1 of the Constitution. Importantly, he concluded that the offence in question was one of strict, rather than absolute, liability. He observed that he was unable to find any authority that suggested it was not competent for the legislature, for a proper purpose, and to a reasonable and proportionate degree, to limit the type of reasonable care upon which an accused might rely to exculpate himself. The defence was, he held, both certain and straightforward. It made the decision as to whether or not to sell, deliver, supply or permit the consumption of intoxicating liquor a simple one; one more open and less likely to cause individual offence to customers.<sup>195</sup>
- 10.133 On appeal, a primary question for the Supreme Court came down to whether the Oireachtas can delimit or define the defence of due diligence in the way it did having regard to the Constitution. The Supreme Court found that the legislation reduces, but does not deprive the judge of the function of fact-finding and determining guilt. Instead, it re-defines the manner in which due diligence can be proved as a probability.<sup>196</sup> MacMenamin J described the limitation of the defences as a “proportionate narrowing of

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<sup>193</sup> *Ibid* at 13(d).

<sup>194</sup> *Ibid* at 19.

<sup>195</sup> [2016] IESC 30, at 31.

<sup>196</sup> *Ibid* at 53.

parameters” which is necessary in order for the effective and just operation of the legislation:

“I would hold, consequently, that this offence is one of strict liability, which frees the prosecution from having to prove the totality of *mens rea*, but nonetheless affords an accused an opportunity to prove, on establishing the necessary evidential ingredients, that *due diligence* had been exercised in the context of the regulated activity in question. There is no impermissible incursion on the judicial function. Rather, what is in question is a proportionate narrowing of parameters, where the defence provided for may be relied on in order that the regulatory legislation designed to meet a public good operates in an effective and just manner.”<sup>197</sup>

10.134 The Supreme Court held that it is constitutional for the legislature, in the case of an offence in this category (a public welfare offence), to proportionately delimit the defence of reasonable care or due diligence to a certain specified minimum standard.<sup>198</sup> It is therefore clear that although a due diligence type defence must apply to strict liability regulatory offences, it is not unconstitutional for the Oireachtas to impose limitations on the available defence.

## C. Due Diligence and Corporate Offences

### 1. A General Due Diligence Defence for Corporate Offences

#### (a) Subjective fault based offences

10.135 In Chapter 8, the Commission has recommended that the proposed scheme of corporate criminal liability should include an attribution model for subjective fault (knowledge, intention or recklessness) based offences, based upon an expanded form of the identification doctrine. This section will consider whether a defence of due diligence should be introduced for subjective fault based offences as they apply to corporations.

10.136 The Commission has recommended that the subjective fault element of an offence, which is to be attributed to the corporate body, may be identified in an employee or agent of the corporate body who exercised a delegated operational authority in relation to the offence in question. An employee or agent will have such authority where he or she has expressly or implicitly been delegated discretion over the implementation of corporate policy, rather than simply being given the role of carrying out such policy.

10.137 It would be inappropriate for a defence of due diligence to apply to subjective fault based offences as such a defence of having taken all reasonable steps or care to prevent would

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<sup>197</sup> *Ibid* at 55.

<sup>198</sup> *Ibid* at 61.

not be compatible with a situation in which an employee or agent knowingly, intentionally or recklessly exercised a delegated operational authority in relation to an offence. In particular, a corporation should not be enabled to avail of a due diligence type defence in situations in which criminal conduct was expressly delegated to, tacitly allowed of or recklessly tolerated of an employee or agent.

10.138 In order to avail of a due diligence defence, the act causing the offence must not have been intended by the accused. It would clearly not be appropriate to provide a defence for a corporate body that it “took all reasonable precautions to avoid commission of the offence”, but then maintain that it intentionally committed the offending conduct in spite of those precautions. For this reason, a due diligence defence can apply only to an offence that does not require proof of intention or knowledge.

10.139 The Commission acknowledges that there may be certain instances in which an entity may have organised itself in such a way that an officer of the company was able to commit a subjective fault based offence. However, in cases where an entity had adequate policies and procedures in place alongside effective processes for monitoring and preventing officers from committing offences, the Commission recognises that such an entity should not be held liable and a rebuttable presumption of the conduct element is provided for in this regard. The failure to prevent liability scheme could also apply in such circumstances. The failure to prevent model is discussed in further detail later in the chapter.

#### **(b) Objective fault based offences**

10.140 The Commission has recommended that the proposed scheme of corporate criminal liability attribution provide for two separate models for attribution of objective fault: one based upon the gross negligence standard; and one based upon the simple negligence standard. This section will consider whether a defence of due diligence should be introduced for objective fault based offences as they apply to corporations.

10.141 The Commission recommends that, in both of these objective fault models, when assessing whether a corporate body has breached the standard of care, regard should be had to the way in which the organisation’s activities are managed or organised by high managerial agents. This should be done by reference to a non-exhaustive list of “corporate culture” factors, such as internal governance systems, as well as the role of “high-managerial agents”.

10.142 Such an approach would encourage a realistic assessment of the “organisational fault” of the corporate body. Under such a scheme, the standard of care will be assessed in determining an organisation’s liability for objective fault based offences. The availability of a defence/rebuttable presumption of reasonable care for objective fault based offences also allows a corporation to prove that reasonable care was taken to prevent offending through the imposition and maintenance of measures such as internal governance systems.

10.143 A due diligence type defence may be inappropriate for objective fault based offences as the nature of such offences, for example negligence based offences, implicitly involve failure to take reasonable care with the onus on the prosecution to establish such failure.

**(c) No fault based offences**

10.144 The Commission has recommended in Chapter 8 that the scheme of corporate criminal liability attribution should provide that strict and absolute liability offences apply direct personal liability to a corporate body defendant. As earlier examined, the distinction between strict and absolute liability is that, while neither category of offence requires the prosecution to prove fault on the part of a defendant, strict liability offences will include a defence, which will allow a defendant to demonstrate his or her lack of culpability in order to avoid liability, whereas absolute liability offences will not provide any such offence.

10.145 While a defence will apply to strict liability offences, the nature of the defence which may be provided for any given strict liability offence may change, as detailed earlier in this report. Certain strict liability offences may provide for a defence which incorporates elements of a defendant's subjective awareness,<sup>199</sup> others will allow the defendant unqualified opportunity to satisfy the court that they had acted objectively reasonably,<sup>200</sup> while other strict liability offences will only provide a defence where the defendant can demonstrate that he or she had taken defined steps.<sup>201</sup> The application of a due diligence type defence to certain strict liability offences is appropriate for a number of reasons including that it would ensure fairness in a situation where a corporation has done all that it can to avoid the problem or harm intended to be prevented by the strict liability offence. Other reasons are that the existence of a due diligence defence may prevent any unconstitutionality issues and such a defence may serve to prevent over criminalisation. The introduction of a due diligence type defence would also increase efficiency in the prosecution of strict liability offences as there would be a reverse burden of proof on the

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<sup>199</sup> Section 2(3) of the *Criminal Justice (Sexual Offences) Act 2006*, as amended by section 16 of the *Criminal Law (Sexual Offences) Act 2017*, provides for a defence to the strict liability offence of defilement of child under 15 years of age, where the defendant can prove the he or she had made a "reasonable mistake" as to the age of the child. This defence does require the mistake of the defendant to be "reasonable", an objective standard, but it also takes account of the defendant's subjective understanding as to the age of the child in question.

<sup>200</sup> Section 55(1)(y) of the *Consumer Protection Act 2007* provides a defence to a strict liability offence, if the defendant proves that it "exercised due diligence and took all reasonable precautions to avoid commission of the offence."

<sup>201</sup> Section 31 of the *Intoxicating Liquor Act 1988*, as amended by section 14(1)(b) of the *Intoxicating Liquor Act 2000*, provides a defence to the strict liability offence of selling, or permitting the sale of intoxicating liquor to a person under the age of 18, where the defendant demonstrates that he or she required the production of an age card demonstrating that the person served was over the age of 18. The 2000 amendment had the effect of limiting this defence, which had previously allowed the defendant to avoid liability by demonstrating that he or she believed that the person served was over the age of 18 based upon any "other reasonable grounds". The limitation of the due diligence defence was held to be constitutional in the case of *Waxy O'Connors Limited v Judge David Riordan* [2016] IESC 30.



defendant. As due diligence may involve information which is peculiarly in the knowledge of a defendant, this would greatly ease the burden on the prosecution.

10.146 The Law Commission of England and Wales has proposed that the question of whose due diligence was relevant would depend on who was charged with the offence. Consequently, in a situation under this proposed scheme of attribution where a company was charged with the offence, it would not be enough for them to show that someone else, such as an employee, had exercised due diligence in seeking to avoid committing the offence. The issue would be whether the company's own system for preventing the committal of offences reflected due diligence, in that regard. That would involve an examination, for example, of their systems of management and control over employees. The Law Commission of England and Wales has also suggested that the burden of proof (on the balance of probabilities) should be on the person or entity seeking to benefit from the defence to prove that due diligence in all the circumstances had been shown.<sup>202</sup> This already applies to existing statutes in this jurisdiction and it would appear appropriate that it should be generally applicable where a due diligence defence applies to strict liability offences.

**(d) Attribution of the conduct element to the corporation**

10.147 In Chapter 8, the Commission has also recommended that the proposed model for conduct attribution include a rebuttable presumption that the conduct element of the offence has been satisfied. The Commission has recommended that the corporate body defendant shall rebut this presumption by demonstrating (to the satisfaction of the evidential burden) that:

- the positive criminal act or conduct which caused a criminal result, which amounts to conduct element of the offence in question, was not committed by an employee or agent of the corporate body; or
- the corporate body had taken all reasonable steps to prevent commission of the conduct in question.

10.148 The provision under the scheme proposed in Chapter 8 for the corporate body to rebut the conduct element by demonstrating that it had taken all reasonable steps to prevent commission of the conduct in question effectively allows for a due diligence type defence as regards the conduct element of the offence. A due diligence defence would be unsuitable for the proposed attribution model due to the wide range of offences and culpability levels. A due diligence defence may further be inappropriate for the attribution model as a whole due to the duplication effect that it may have on the purpose of the rebuttable presumption in terms of proving that all reasonable steps had been taken to

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<sup>202</sup> The Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraphs 6.21-6.23.

prevent the commission of the conduct. However, a due diligence defence would be effective for strict liability corporate offending.

**R 10.03 The Commission recommends that a due diligence defence is appropriate for the corporate liability attribution model recommended in Chapter 8, insofar as it applies to strict liability offences.**

## **2. A Failure to Prevent Approach to Corporate Offences**

### **(a) Overview of the Failure to Prevent Model**

10.149 A failure to prevent model or strict direct omissions liability offence would focus on the responsibility of a company to ensure that offences are not committed in its name or on its behalf. A company would be convicted without the need for proof of any fault element, not of the substantive offence, but of a separate offence akin to a breach of statutory duty to ensure that crimes are not committed in its name or on its behalf.<sup>203</sup> By focusing on a failure to exercise supervision over the conduct of those pursuing a company's business objectives, this model may more accurately target the real nature of corporate culpability.<sup>204</sup>

10.150 Variations of the failure to prevent model exist in both common and civil law jurisdictions including Finland,<sup>205</sup> Switzerland,<sup>206</sup> Canada,<sup>207</sup> and England and Wales.<sup>208</sup> Failure to prevent models introduced in other jurisdictions are subject to a due diligence type defence. It is frequently argued that if such a model is to be effective as a mean of incentivising corporate crime prevention, such a defence is required. A due diligence type defence may also be required in this jurisdiction in order to render the offence constitutionally permissible.

10.151 This combination of a strict direct liability offence and a due diligence type defence is the model used in section 7 of the UK *Bribery Act 2010*; it is termed "failure to prevent" liability.<sup>209</sup> This model is discussed in further detail in the next section.

### **(b) Structure of the UK *Bribery Act 2010* Failure to Prevent Model**

10.152 The failure to prevent model was designed to address the restrictions posed by the identification model of corporate liability attribution. The United Kingdom came under

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<sup>203</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 17.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Penal Code of Finland*, chapter 9, section 2.

<sup>206</sup> *Swiss Code Penal*, Article 102.1 and Article 102.2.

<sup>207</sup> *Canadian Criminal Code*, section 22.2(c).

<sup>208</sup> *Bribery Act 2010*, section 7 and *Criminal Finances Act 2017*, section 45 and section 46.

<sup>209</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 18.

pressure from the OECD Working Group on Bribery, which believed that the identification route to corporate liability was wholly inadequate in meeting the UK's obligations under the *OECD Anti-Bribery Convention*.<sup>210</sup> There was wide recognition that the solution was not the replacement of the identification doctrine with vicarious liability. Vicarious liability was viewed as too rough and ready for the task of attributing blame for serious harms, and has been criticised for under inclusivity by demanding that liability flow through an individual, however great the fault of the corporation, and over inclusivity by blaming the corporation whenever the individual employee is at fault even in circumstances in which the corporation had exercised due diligence.<sup>211</sup>

10.153 The *Bribery Act 2010* introduced an offence under which a company is liable, subject to a due diligence defence of adequate procedures, for failing to prevent bribery activities by persons associated with it.<sup>212</sup> This has been assessed as more than satisfying the OECD's Good Practice Guidance on article 2 of the Convention.<sup>213</sup> Article 2 provides that the level of authority of the person whose conduct triggers the corporation's liability should either reflect the wide variety of decision-making systems or should be a person with the highest level managerial authority who directly engages in, or directs or authorises, bribery or fails to prevent a junior person from doing so, through a failure of supervision or a failure to implement adequate internal controls, ethics and compliance.<sup>214</sup>

10.154 Under the failure to prevent model set out in section 7(1) of the UK *Bribery Act 2010*, "a relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C."

10.155 Section 7(2) provides for a due diligence type defence: "But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct". Subject to the defence of adequate procedures, it is essentially an offence of strict liability – the commercial organisation is held liable for bribery committed by someone else associated with the organisation, whether or not the organisation itself had any criminal intent.

10.156 Only a "relevant commercial organization" can commit an offence under section 7 of the Act. A "relevant commercial organization" is defined at section 7(5) of the Act as a body or partnership incorporated or formed in the UK irrespective of where it carries on a

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<sup>210</sup> Wells, "Corporate criminal liability: a ten year review" (2014) Crim LR 12, at 864.

<sup>211</sup> *Ibid.*

<sup>212</sup> UK *Bribery Act 2010*, section 7.

<sup>213</sup> *OECD Anti-Bribery Convention and OECD Good Practice Guidance 2010*.

<sup>214</sup> Wells, "Corporate criminal liability: a ten year review" (2014) Crim LR 12, at 865.

business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The offence also applies to organisations incorporated elsewhere if they carry on a business, or part of a business in any part of the UK. It is for the courts to decide as to whether an organisation “carries on a business” in the UK taking into account the particular facts in individual cases. However, the Government’s guidance on the Bribery Act sets out the Government’s intention as regards the application of the phrase.<sup>215</sup> Generally, provided that the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be apprehended if it engages in commercial activities, irrespective of the purpose for which profits are made.

10.157 The only element of fault in section 7 relates to the individual commission of the substantive offence, not the failure to prevent it. This broadening of criminal liability is viewed as a positive dimension of the offence, as a means of supplementing intentionality.<sup>216</sup> The principal justification for the creation of the corporate offence is to deter companies from giving direct or indirect support to a practice or culture of bribe-taking on the part of those with whom they do business.<sup>217</sup> Law Commission of England and Wales has justified this offence on the basis that companies are in the best position to ensure that the damage caused by the bribery is reduced or even eliminated.<sup>218</sup>

(i) *Corporate and director liability under the UK Bribery Act 2010*

10.158 Corporations can also be prosecuted directly for active, passive or foreign public official offences under sections 1, 2 and 6 of the *Bribery Act 2010* using the identification principle. While it may be easier for prosecutors to use the Section 7 offence, the threat of prosecution could act as a useful bargaining tool in enforcement.<sup>219</sup> A corporate prosecution also allows for the use of the consent and connivance offence against individual directors. Section 14 provides that if a corporate body is found guilty of any of the offences under sections 1, 2 or 6, then any director or senior officer who has *consented or connived* in the offence is also individually liable. An individual director can only be prosecuted if the corporation itself is liable.

10.159 Although it must be shown that there is intention or knowledge on the part of a “directing mind” (i.e. a director or senior officer) before a corporate entity is liable, the liability of other directors or officers where they had “consented or connived”<sup>220</sup> could be easier to

<sup>215</sup> UK Ministry of Justice, *Bribery Act 2010 – Guidance* (2011) at 15.

<sup>216</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 3.

<sup>217</sup> The Law Commission of England and Wales, *Reforming Bribery* (No. 313 2008) at 98.

<sup>218</sup> The Law Commission of England and Wales, *Reforming Bribery* (No. 313 2008) at 99.

<sup>219</sup> Wells, “Corporate criminal liability: a ten year review” (2014) *Crim LR* 12, at 872.

<sup>220</sup> UK *Bribery Act 2010*, section 14.

prove than the knowledge required of the directing mind. This could result in the conviction of directors or senior officers who would otherwise have avoided liability due to an inability to prove intention or knowledge.

(ii) *Definition of “associated person” under the Bribery Act 2010*

10.160 A commercial organisation is liable under section 7 if a person “associated” with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined in section 8 as a person who “performs services” for or on behalf of the organisation. This person may be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation is irrelevant, meaning that employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, clearly states the question as to whether a person is performing services for an organisation is to be determined “by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between [the organisation and the person]”. The concept of a person who “performs services for or on behalf of” the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf.<sup>221</sup>

(iii) *The “adequate procedures” defence under the Bribery Act 2010*

10.161 The failure to prevent bribery offence is committed unless the organisation can prove that it had in place adequate procedures to prevent the conduct. Section 7(2) provides: “[b]ut it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct”.

10.162 The question of adequacy of bribery prevention procedures will depend on the final analysis of the facts of each case, including factors such as the level of control over the activities of the associated person and the degree of risk that requires mitigation.<sup>222</sup>

10.163 The Secretary of State is required by section 9 of the Act to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing. However, much of the Guidance is devoted to explaining the Act as a whole. The Guidance sets out six principles that should inform the procedures implemented by commercial organisations in order to prevent bribery being committed on their behalf. These six principles are: proportionate procedures, top level commitment, risk assessment, due diligence, communication (and training) and

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<sup>221</sup> UK Ministry of Justice, *Bribery Act 2010 – Guidance* (2011) at 16

<sup>222</sup> UK Ministry of Justice, *Bribery Act 2010 – Guidance* (2011) at 18.

monitoring and review.<sup>223</sup> The Guidance provides further detail on the measures or “adequate procedures” necessary to satisfy the principles.<sup>224</sup>

10.164 Due diligence, as a form of risk assessment and risk prevention, is one of the six principles. The purpose of this principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.<sup>225</sup>

10.165 The Guidance clarifies that these principles are not prescriptive. They are intended to be flexible and outcome focused, allowing for the wide variety of circumstances that commercial organisations find themselves in. The Guidance acknowledges that small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, it recognises that the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.<sup>226</sup>

10.166 While one important point taken from the Guidance is that companies need to consider bribery risks, one commentator has suggested that the underlying aim is to reassure businesses that they will not be at risk of prosecution for isolated examples of bribery, providing they can prove top level commitment to preventing bribery, and have undertaken risk assessments, training and monitoring.<sup>227</sup>

### **(c) Advantages and Effectiveness of the Failure to Prevent Model**

10.167 There are many perceived advantages to a failure to prevent model. The stated purpose of section 7 of the *Bribery Act 2010* is “to influence behaviour and encourage bribery prevention as part of corporate good governance.” Furthermore, the rationale for the “adequate procedures” defence is “to encourage companies to realistically assess the bribery risks they face and put in place proportionate procedures to mitigate them”. This indicates that the law is aimed at preventing criminal activity by acting as a mechanism to influence behaviour, rather than a provision that operates primarily in reactive mode to punish corporate crime. In this vein, the *Bribery Act 2010* offence is said to encourage commercial organisations to refine their compliance policies and to manage the risk of bribery by employees or agents.<sup>228</sup> The Ministry of Justice has stated that the *Bribery Act 2010* has already been successful in this regard. In its *Call for Evidence on Corporate*

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<sup>223</sup> UK Ministry of Justice, *Bribery Act 2010 – Guidance* (2011) at 20-28. The six principles are set out in detail at 20-28.

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid* at 20.

<sup>226</sup> *Ibid* at 20.

<sup>227</sup> Wells, “Corporate criminal liability: a ten year review” (2014) Crim LR 12, at 870-871.

<sup>228</sup> *Ibid* at 849.

*Liability for Economic Crime*,<sup>229</sup> the Ministry stated that since implementation in July 2011, section 7 has provided a powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance. It added that its utility as an enforcement tool has been recently demonstrated.<sup>230</sup> Another advantage of the *Bribery Act* approach is that it provides for a specific offence that only commercial organisations can commit<sup>231</sup> particularly as critics of the identification doctrine argue that the challenges posed by the doctrine increase the risk of extra cost to the taxpayer as result of criminal investigations.<sup>232</sup> Commentators contrast the identification doctrine issues with the UK Serious Fraud Office's recent experience in its successful Section 7 cases in which clarity on corporate liability facilitated early and decisive conclusions.<sup>233</sup> It is important to assess the successes of the *Bribery Act 2010* model as an indicator of the likely practical effectiveness of failure to prevent models generally.

10.168 Recent years have seen increasing enforcement successes under Section 7 of the *Bribery Act 2010* with the Serious Fraud Office investigating growing numbers of high profile cases. The list of cases which the Serious Fraud Office has under consideration or in which charges have been made or Deferred Prosecution Agreements (DPA) obtained includes: Standard Bank, Rolls Royce, GSK, Barclays, G4S and Serco, GPT, Alstom, ENRC and Airbus.<sup>234</sup> At the time of writing (September 2018), 5 corporations have been charged with section 7 failures to prevent bribery: Standard Bank; Sweett Group; XYZ Ltd (an anonymised UK small to medium enterprise), Rolls-Royce PLC and Skansen Interiors Limited. Section 7 was considered by the English High Court in *Serious Fraud Office v Standard Bank Plc*,<sup>235</sup> in the context of the judicial approval of the UK's first DPA under the *Crime and Courts Act 2013*. Leveson P noted that the Serious Fraud Office had been satisfied that the materials disclosed to the Serious Fraud Office were not sufficient to enable the defendant bank to establish the due diligence defence. He accepted that the materials failed to demonstrate that the defendant bank had adequate procedures in place designed to prevent persons associated with the commercial organisation from undertaking the bribery. Leveson P also noted that the bank's applicable policy was unclear and was not reinforced effectively to relevant employees; and that the bank's training did not provide sufficient guidance about relevant obligations and procedures.<sup>236</sup>

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<sup>229</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 6.

<sup>230</sup> *Ibid* at 6.

<sup>231</sup> Wells, "Corporate criminal liability: a ten year review" (2014) *Crim LR* 12, at 853.

<sup>232</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 15.

<sup>233</sup> *Ibid* at 15.

<sup>234</sup> Wells, "Corporate failure to prevent economic crime – a proposal" (2017) *Crim LR* 6, at 429.

<sup>235</sup> *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen's Bench Division (Leveson P), 30 November 2015.

<sup>236</sup> *Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement* (Case No: U20150854), English High Court, Queen's Bench Division (Leveson P), 30 November 2015, at paragraph 11 of the judgment.

10.169 Until 2018, no Section 7 case had been contested at trial: Sweett Group, which pleaded guilty to the section 7 charge, was ordered to pay £2.25 million<sup>237</sup> and the Standard Bank,<sup>238</sup> XYZ Ltd<sup>239</sup> and Rolls-Royce PLC<sup>240</sup> cases involved Deferred Prosecution Agreements. The use of DPAs and the absence of a criminal trial meant that there had been no judicial articulation or confirmation of the terms of section 7, especially the meaning of “adequate procedures” and how the defence operates in practice. Commentators had noted that while the statement of facts in the DPAs included a narrative and thus indicated what failure to prevent looks like, there was no outline of the compliance procedures.<sup>241</sup>

10.170 In 2018, in *R v Skansen Interiors Limited*,<sup>242</sup> the defendant, a refurbishment company, won a tender for a number of valuable contracts. It was alleged that the tender process had been corrupted by a bribe involving an employee of the organisation tendering the contract and Skansen. The bribery had involved a system of false invoicing. Both entities pleaded guilty to offences under the UK *Bribery Act 2010*. Skansen was subsequently prosecuted and convicted under section 7 of the Act.

10.171 Skansen unsuccessfully argued that as it was a small local business employing 30 people within a single open-plan office space, it did not require sophisticated controls to prevent bribery for its controls to constitute adequate procedures under the UK *Bribery Act 2010*. It gave evidence that there were multi-level controls in place for the payment of invoices and that it had used standard-form anti-bribery clauses in a number of its contracts. It was also established that the company ethos was to behave and conduct their dealings with honesty, transparency and integrity and there were existing policies which reflected this ethos. It also argued that it successfully prevented the processing of the payment of the largest bribe. However, these measures were viewed as inadequate.

10.172 The rejection of Skansen’s defence by the jury is of significance as it gives the first indication of the extent of the measures which the courts will require to be proven in order to find that a company has adequate procedures in place. However, no judicial direction or interpretation was provided on the meaning of “adequate procedures” so indications can only be drawn from the Crown Prosecution Service’s submissions, which

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<sup>237</sup> *R v Sweett Group PLC*, Southwark Crown Court, 19 February 2016. *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction*. Available at: <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

<sup>238</sup> *SFO agrees first UK DPA with Standard Bank*. Available at: <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.

<sup>239</sup> *SFO secures second DPA* <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>.

<sup>240</sup> *SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC* <https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/>.

<sup>241</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 4.

<sup>242</sup> *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018.



provide some insight into what factors may have been considered by the jury in finding that Skansen had failed to establish the adequate procedures defence. The prosecution argued that:

- Incomplete compliance records were held by the company, there was no designated compliance officer to whom staff could report concerns and there were few records of efforts to foster a culture of compliance;
- The company had failed to enact any specific procedures (such as an anti-bribery policy) in compliance with the changes in the law brought about by the Bribery Act or its related Guidance; and
- There was no evidence of active staff training or communication to ensure that staff had accessed, read, or were even aware of the company's existing policies.

10.173 It is noteworthy that Skansen conducted its own internal investigation before self-reporting the improper activity to the authorities and it fully cooperated with the subsequent investigation. It had also appointed a new Chief Executive Officer, introduced an anti-bribery and corruption policy, summarily dismissed two directors, filed a suspicious activity report with the National Crime Agency and reported the matter to the City of London Police. However, it is now clear that procedures are not adequate if they are limited to an anti-bribery policy implemented after the bribery has been identified. Procedures implemented after the act of bribery will not be adequate or sufficient to avoid conviction.

10.174 The trial judge queried the decision to bring the prosecution against a dormant company against which no financial penalty could be imposed and the only possible sentence could be an absolute discharge. The Crown Prosecution Service stated that the public interest test for a prosecution was satisfied to signal a message to other corporations. The Crown Prosecution Service also decided that no long term benefit could be achieved by a DPA in this instance.

10.175 Commentators have asserted that the decision to prosecute a company in these circumstances is open to question because many of the factors against prosecution in the Joint Guidance on Corporate Prosecutions applied in this case.<sup>243</sup> It has also been commented that the jury's verdict alone does not determine the standard of adequate procedures for the purposes of the *Bribery Act 2010*, and has no value as a precedent in that regard.<sup>244</sup>

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<sup>243</sup> CorkerBinning, A Bribery Act prosecution "pour encourager les autres", 9 March 2018, Available at: <https://www.corkerbinning.com/a-bribery-act-prosecution-pour-encourager-les-autres/>.

<sup>244</sup> CorkerBinning, A Bribery Act prosecution "pour encourager les autres", 9 March 2018, <https://www.corkerbinning.com/a-bribery-act-prosecution-pour-encourager-les-autres/>.

10.176 However, it may be that the decision in the first contested case indicates that the adequate procedures defence imposes a relatively high standard of corporate behaviour that cannot be complied with by merely having in place some corporate procedures that do not effectively result in compliance with the law or by implementing procedures only upon detection of the prohibited acts.

**(d) Critiques of the Failure to Prevent Model**

10.177 While there has been a reasonable level of commentary on the arguments in favour of the extension of the failure to prevent model, there had been no commentary explicitly setting out possible objections to its extension until recently. Campbell has recently considered the implications of extending the model to other offences focusing on: due process rights; aversion to omissions liability; effectiveness and the use of the *Bribery Act 2010* provisions to date.<sup>245</sup>

*(i) The Presumption of Innocence and Due Process Rights*

10.178 One argument against failure to prevent offences is that they may inhibit the due process rights of corporations involved in prosecutions for such offences.<sup>246</sup> Criminal conviction has significant consequences for both individuals and corporations. Although corporations cannot be imprisoned, a conviction for failure to prevent crime will generally result in a fine and may damage personal and professional reputations.<sup>247</sup> The rationale for due process rights including the presumption of innocence is to offset, to some degree, the imbalance of power that exists between the state and the defendant, and to ensure that liability is attributed only to those convicted to the requisite standard.<sup>248</sup> With this in mind, corporations enjoy many rights under the European Convention on Human Rights (ECHR), including due process rights.<sup>249</sup>

10.179 The *Bribery Act 2010* model does not require proof of fault with regard to a corporation's omission, and instead places an onus on it to demonstrate adequate compliance procedures in what has been termed a "reverse burden defence".<sup>250</sup> One objection to this is that it impinges on the presumption of innocence as protected by article 6(2) of the *ECHR*.<sup>251</sup> While this may appear to be an issue, in certain circumstances, the legislature may justifiably allocate a legal burden of proof to the accused for criminal offences. This is

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<sup>245</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 1 and 5-10.

<sup>246</sup> *Ibid* at 5.

<sup>247</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 5.

<sup>248</sup> *Ibid*.

<sup>249</sup> *Ibid*.

<sup>250</sup> Wells, "Corporate failure to prevent economic crime – a proposal" (2017) *Crim LR* 6, at 435.

<sup>251</sup> *Ibid*.

done through the use of reverse onus clauses or defences, which require accused parties to prove that they are not guilty of the offence in question or that an available defence has been satisfied.

10.180 The English Court of Appeal has upheld the imposition of a legal burden of proof where it is justifiable to achieve important public interests. In *R v Davies*,<sup>252</sup> the Court held that a legal burden of proof in the form of a defence of reasonable practicability in section 40 of the *Health and Safety at Work Act 1974* for offences consisting of a failure to comply with a duty or requirement to do something “so far as is practicable, or so far as reasonably practicable, or to use the best practicable means to do something” was justified, necessary and proportionate, and was not incompatible with article 6(2). In this jurisdiction, the Supreme Court decision in *Hardy v Ireland*<sup>253</sup> is authority for the proposition that reversals of the evidential and, potentially, legal burden of proof (and therefore *prima facie* breaches of the presumption of innocence) are constitutionally permissible. It was held that section 4 of the *Explosive Substances Act 1883* merely placed an evidential burden on the accused and therefore did not violate the presumption. Since then, the Court of Appeal in *The People (DPP) v Forsey*<sup>254</sup> upheld a provision which imposes a reverse burden of proof in certain bribery cases in holding that section 4 of the *Prevention of Corruption Act 2001* imposes a legal burden of proof on the accused. The Court recognised that the presumption of innocence is a constitutional right pursuant to Article 38.1 of the Constitution, as well as a right under common law and under Article 6.2 of the *ECHR*, however, it observed that this right is not absolute. It was held that restrictions on the presumption of innocence can be justified in circumstances of special or particular importance and need and where it is exceptionally appropriate to the crime and where it is reasonable.<sup>255</sup>

10.181 The case law indicates that the use of reverse onus defences here does not compromise Article 6 of the *ECHR*. Several arguments can be made in favour of reverse onus defences including that they are directed at a legitimate objective, the prosecution and prevention of serious criminality; they allow corporate defendants to exonerate themselves through articulation of compliance procedures; it is more appropriate for the entity than the prosecution to prove the details of internal procedures and implementation in practice; and the imposition of the burden is necessary, reasonable and not arbitrary.<sup>256</sup> Furthermore, reverse onus defences do not require proof of lack of guilt; what must be established only is the presence and use of adequate or reasonable procedures.<sup>257</sup> It has

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<sup>252</sup> *R v Davies* [2002] EWCA Crim 2949.

<sup>253</sup> [1994] 2 IR 55.

<sup>254</sup> [2016] IECA 233.

<sup>255</sup> [2016] IECA 233.

<sup>256</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 6.

<sup>257</sup> *Ibid.*

also been argued that one of the key strengths of the failure to prevent model in the UK has been the reverse burden defence in relation to adequate procedures to prevent.<sup>258</sup> Wells has stated that its strength is such that the compliance incentive would likely be removed if this were to change.<sup>259</sup> It therefore appears that there are no justifiable due process arguments against the failure to prevent model.

(ii) *Omissions Liability*

10.182 Another critique of indirect corporate criminal liability is an opposition to omissions liability in general. The general approach regards omissions liability as exceptional and as requiring special justification.<sup>260</sup> It is a guiding principle of the law that defendants are liable according to what they do, not what others do and they fail to prevent.<sup>261</sup> The extent to which this approach still holds true is questionable.

10.183 It has been suggested that concerns about omissions liability for individuals do not apply in the context of failure to prevent offences and that any argument opposing indirect corporate criminal liability on this ground can be rebutted by two arguments: first, that various forms of individual liability based on omissions are accepted; and second, that the justifications based on duty and opportunity are even more pertinent and tolerable for corporate entities.<sup>262</sup>

10.184 In relation to corporations, it may be justifiable to attach duties reinforced by criminal offences of failing to comply with certain requirements where a person undertakes a particular role or trade.<sup>263</sup> It may also be justifiable to require a not-too-demanding positive act if another person's vital interests are at stake.<sup>264</sup> Furthermore, it can be argued that the corporate entity is placed ideally in this context in terms of opportunity to prevent such criminality.<sup>265</sup> It could also be argued that the prevention and control of crime cannot be left to the state alone and that "responsibilisation", the delegation of state responsibility to local organisations, should be implemented.<sup>266</sup> Arguably, failure to

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<sup>258</sup> Wells, "Corporate failure to prevent economic crime – a proposal" (2017) *Crim LR* 6, at 435.

<sup>259</sup> *Ibid* at 435.

<sup>260</sup> Ormerod and Laird, *Smith and Hogan's Criminal Law* 14<sup>th</sup> ed (OUP 2015) at 72-73.

<sup>261</sup> Simester, Spencer, Stark, Sullivan and Virgo (eds), *Simester and Sullivan's Criminal Law*, 6<sup>th</sup> ed (Hart Publishing 2016) at 15.

<sup>262</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 7.

<sup>263</sup> Ashworth, "A new generation of omissions offences?" (2018) *Crim LR* 5, at 357.

<sup>264</sup> *Ibid*.

<sup>265</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 7; Copp and Cronin, "New models of corporate criminality: the development and relative effectiveness of 'failure to prevent' offences" (2018) *Comp Law* 39(4) at 117.

<sup>266</sup> Ashworth, "A new generation of omissions offences?" (2018) *Crim LR* 5, at 362.

prevent offences can also be justified as companies operate in order to generate a profit and companies would most likely benefit from the wrongdoing of “associated persons”.<sup>267</sup>

10.185 The above reasons serve to clarify the acceptability of imposition of omissions liability through the failure to prevent model.

(iii) *Effectiveness*

10.186 A further argument is that the effectiveness of failure to prevent models is unclear and unproven.<sup>268</sup> The UK Ministry of Justice has recently stated that the enactment of the *Bribery Act* failure to prevent model in 2011 provided a “powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance” and that the utility of the failure to prevent model as an enforcement tool has been recently demonstrated.<sup>269</sup> Other sources refer to widespread adoption of new corporate practices evidencing that compliance is taken seriously.<sup>270</sup> However, Campbell points to a lack of empirical evidence that compliance programmes, as are required by these defences, are transformative in preventing or deterring crime, and in fact they may impact negatively in permitting the rationalisation of problematic behaviour.<sup>271</sup> Furthermore, it has been stated that the procedures can act as superficial compliance, and may overlap with pre-existing obligations.<sup>272</sup>

10.187 Given the lack of prosecutions, there has been no judicial articulation of the level of measures required to constitute adequate or reasonable procedures. It may, therefore, be unclear whether a corporation’s procedures have failed to meet the required standard. As a result, decisions on whether or not to bring a prosecution in the UK have relied on the Serious Fraud Office’s investigation and assessment of whether or not to charge, as well as the judicial oversight provided in the conclusion of DPAs.<sup>273</sup> The open-textured nature of the standards necessary to satisfy the due diligence defences means there is considerable scope for negotiation by corporate entities in establishing what is adequate or reasonable.<sup>274</sup> This results in the accused entity shaping the meaning of the defence for

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<sup>267</sup> Wells, “Corporate Failure to Prevent Economic Crime – A Proposal,” (2017) Crim LR, at 423 and 430. Wells argues that failure to prevent offences are justified as “a corporations benefits from the wrongdoing of the associated persons acting in pursuit of contractual or commercial advantage or tax limitation.”

<sup>268</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) Law and Financial Markets Review, at 7.

<sup>269</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 6.

<sup>270</sup> Copp and Cronin, “New models of corporate criminality: the development and relative effectiveness of ‘failure to prevent’ offences” (2018) Comp Law 39(4) at 104.

<sup>271</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) Law and Financial Markets Review, at 7.

<sup>272</sup> *Ibid.*

<sup>273</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) Law and Financial Markets Review at 8.

<sup>274</sup> *Ibid.*

the offence with which it is charged so business interests therefore define, or at least influence, legality.<sup>275</sup> However, it could also be argued that allowing corporate entities to influence the content and parameters of defences surely is the intention, if their behaviour is to be affected positively.<sup>276</sup>

10.188 The low number of prosecutions for failure to prevent bribery under section 7 to date may not be reflective of the ineffectiveness of the failure to prevent model or of particularly low levels of bribery. It has been highlighted that the *Bribery Act 2010* came into force reasonably recently, does not have retrospective effect, and the corporate model of criminal liability it uses is an innovation lacking any equivalent in the earlier anti-bribery regime.<sup>277</sup> The provisions only apply to offences committed since July 2011. In 2016, Smith & Ouzman Ltd was convicted of three counts of corruption but, as the bribes had taken place between November 2006 and December 2010, this was prosecuted under section 1(1) of the *Prevention of Corruption Act 1906*<sup>278</sup> rather than the *Bribery Act 2010*. Furthermore, investigations of this nature are inevitably long-running meaning that convictions are often secured years after the offence was committed such as in the *Smith & Ouzman* case, which was concluded in January 2016, having commenced in October 2010.<sup>279</sup> While only a limited number of proceedings have been brought under the *Bribery Act 2010* thus far, the Serious Fraud Office has confirmed that there are around 60 ongoing investigations with further resolutions expected,<sup>280</sup> and as we have seen, there has recently been the first contested case under section 7 of the Act.<sup>281</sup>

10.189 While there have been some doubts regarding failure to prevent models due to the lack of empirical evidence demonstrating the effectiveness of compliance programmes, it has been suggested that a critical and mitigating strength of the UK framework is that it “frontloads” compliance in its inclusion as a legislative due diligence defence rather than compliance efforts being raised in later negotiation with the companies, and so may be more positively impactful in providing a compliance incentive upfront.<sup>282</sup> It may also be reasonable to expect that the increasing publicity of investigative actions and enforcement measures being taken, in increasingly high-profile corporate cases, will continue to reduce the knowledge and awareness deficit that has been identified in

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<sup>275</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 8.

<sup>276</sup> *Ibid.*

<sup>277</sup> Copp and Cronin, “New models of corporate criminality: the development and relative effectiveness of ‘failure to prevent’ offences” (2018) *Comp Law* 39(4) at 115.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> Dechert LLP, *Anti-corruption & Bribery in the United Kingdom* (Lexology 10 August 2018). Available at: <https://www.lexology.com/library/detail.aspx?q=b4fc3f99-4168-4884-a4c3-d0ed3f7f3f0>.

<sup>281</sup> *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018.

<sup>282</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*.

relation to the anti-bribery offences.<sup>283</sup> Publicity may also serve to increase compliance as it will illustrate that a purely tick-box approach to corporate anti-bribery and corruption policy is not enough to demonstrate that due diligence has been exercised and to avoid penalty.<sup>284</sup> The defences provide a prevention incentive to create and implement adequate or reasonable procedures, which, despite some lack of evidence, should result in changes to corporate governance and practice. Thus, on balance, a lack of empirical evidence may not signal any long-term ineffectiveness of the failure to prevent model.

10.190 In 2018, the House of Lords appointed an ad hoc Select Committee to consider and report on the *Bribery Act*.<sup>285</sup> The Committee has been tasked with examining the overall effectiveness of the Act including where there has been stricter prosecution of corrupt conduct, a higher conviction rate, and a reduction in such conduct. The Committee will also examine the impact of the Act on SMEs and the use of DPAs in relation to bribery and seek to raise awareness and understanding of the Act. The Committee published a call for evidence in June 2018. In a joint submission made by the Law Society, the City of London Law Society and the Fraud Lawyers Association to the Committee in August 2018, the bodies conclude that the *Bribery Act* has had a deterrent effect but that it is difficult to draw any meaningful conclusions about the impact of the use of DPAs due to only a small amount having been agreed so far.<sup>286</sup> It also concludes that prosecutors need to be better resourced to ensure the effectiveness of the Act.<sup>287</sup> In its submissions to the Committee, Transparency International asserted that section 7 of the *Bribery Act* has “proved an effective incentive for business to adopt adequate corporate compliance measures and internal controls”.<sup>288</sup> It has also cautioned against any attempts to weaken the legislation and urged the House of Lords to resist any attempt to “free up business” in a post-Brexit trade environment, citing the success of the Act in providing a sound legal basis for prosecuting bribery.<sup>289</sup> While the Committee is not due to report on its findings until 2019, it appears that initial submissions reflect a consensus that the *Bribery Act 2010* has been

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<sup>283</sup> Copp and Cronin, “New models of corporate criminality: the development and relative effectiveness of ‘failure to prevent’ offences” (2018) *Comp Law* 39(4) at 116.

<sup>284</sup> *Ibid.*

<sup>285</sup> UK Parliament, *Lords select committee appointed to examine Bribery Act 2010* (17 May 2018). Available at: <https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notice/house-of-lords-media-notice---2018/may-2018/lords-select-committee-appointed-to-examine-bribery-act-2010/>

<sup>286</sup> The Law Society, the City of London Law Society and the Fraud Lawyers Association, *House of Lords Committee on the Bribery Act – Responses to the call for Evidence* (1 August 2018) at 2 and 7-8. Available at: <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/bribery-act-evidence-submission/>

<sup>287</sup> *Ibid* at 2.

<sup>288</sup> Transparency International, *Bribery Act - Transparency International UK’s submission of written evidence to the Select Committee on the Bribery Act 2010* (11 July 2018). Available at: <http://www.transparency.org.uk/publications/submission-bribe-select-committee/#.W4b1pehKjcs>

<sup>289</sup> *Ibid.*

effective in preventing bribery but that increased resourcing and awareness are required in order to ensure a higher level of prosecutions.

(iv) *Failure to Prevent in Practice*

10.191 The use of Deferred Prosecution Agreements for failure to prevent offences has been identified as an issue with the implementation of the failure to prevent model in practice.<sup>290</sup> Unlike the direct bribery offences, a defence is included in the failure to prevent offences. The option of a DPA has, therefore, been described as “a second bite of the cherry” in that the corporate entity can still negotiate away from prosecution after admitting the failure offence by virtue of not having adequate or reasonable procedures.<sup>291</sup> The option of a DPA, therefore, provides a duplicate means of avoiding criminal prosecution.<sup>292</sup> Thus, despite the conclusion of DPAs related to section 7 Bribery Act offences to date, Campbell proposes that DPAs should not be available in this context.<sup>293</sup>

10.192 However, negotiating a DPA in respect of substantive bribery offences instead of prosecution may be logical for a prosecutor in some circumstances due to the difficulties in satisfying the requisite burden of proof.<sup>294</sup> DPAs have also been used because they avoid lengthy trials and are cost-effective.<sup>295</sup> Furthermore, it has been highlighted that the consequences of bribery convictions, such as mandatory debarment under EU law,<sup>296</sup> mean that a less punitive approach might be justifiable or arguably in the public interest in some instances.<sup>297</sup> Copp and Cronin also appear to view the use of DPAs as a positive as

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<sup>290</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 7-10; Ryder, “Too scared to prosecute and too scared to jail?” A critical and comparative analysis of the enforcement of financial crime legislation against corporations in the USA and the UK (2018) *J Crim L* 82(3) at 259.

<sup>291</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 9.

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid* at 10.

<sup>294</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 9.

<sup>295</sup> Ryder, “Too scared to prosecute and too scared to jail?” A critical and comparative analysis of the enforcement of financial crime legislation against corporations in the USA and the UK” (2018) *J Crim L* 82(3) at 260.

<sup>296</sup> Regulation 57 of the *Public Contracts Regulations 2015* (which give effect to *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement*) provides that direct bribery offences under sections 1, 2 or 6 of the *Bribery Act 2010*, result in mandatory debarment from all EU public sector contracts for up to 5 years. Although a section 7 offence is not included, a contracting authority may exclude an entity from participation in a procurement procedure if it can demonstrate that it is “guilty of grave professional misconduct, which renders its integrity questionable” (regulation 57(8)).

<sup>297</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 9.



they refer to the section 7 *Bribery Act* offence as being supported by the availability of DPAs.<sup>298</sup>

10.193 While Chapter 5, above, does not refer to the application of DPAs to failure to prevent offence generally, the Commission has recommended in Chapter 5 that DPAs in this jurisdiction should apply to similar offences to which they apply in the UK, so in principle DPAs could be applied to failure to prevent type offences. However, prosecutions of individuals for their roles in the offences would still be possible in conjunction with the agreement of DPAs. The absence of individual prosecutions in conjunction with DPAs in the UK has been criticised and it has been suggested that when a DPA is agreed with the Serious Fraud Office, individual prosecutions of employees or agents of the offending corporations should be pursued in conjunction with the DPA.<sup>299</sup> As outlined in further detail in Chapter 5,<sup>300</sup> DPAs could help to uncover wrongdoing and to secure prosecutions of individual offences as information disclosed by corporate bodies during DPA negotiations could assist in the identification and prosecution of individuals for the roles they played in the offences. This would maintain the deterrent effect posed by the possibility of prosecution of individual company officers and it is therefore important that such individual prosecutions would be pursued, where possible, under both the failure to prevent and DPA models in the Irish context.

10.194 A further concern voiced relates to the absence of corresponding prosecutorial action against individual offenders.<sup>301</sup> Until 2018, there had been no prosecution of any individuals for criminal behaviour related to the same series of facts of the section 7 cases, though investigation continues into the conduct of individuals in Rolls Royce PLC.<sup>302</sup> However, two individuals were convicted and received custodial sentences at Southwark Crown Court in 2018 for their roles in the offences in the case of *R v Skansen Interiors*.<sup>303</sup> As well as receiving a 12 month custodial sentence, the former managing director of Skansen Interiors was disqualified as a director for 6 years. The other participant in the offending scheme received a 20 month custodial sentence, was ordered to pay £10,697 within three months or face a further seven months in prison and was suspended as a director for seven years.<sup>304</sup> These convictions highlight that prosecutions of individual

<sup>298</sup> Copp and Cronin, "New models of corporate criminality: the development and relative effectiveness of 'failure to prevent' offences" (2018) *Comp Law* 39(4) at 117.

<sup>299</sup> Ryder, "Too scared to prosecute and too scared to jail?" A critical and comparative analysis of the enforcement of financial crime legislation against corporations in the USA and the UK" (2018) *J Crim L* 82(3) at 260 and 262.

<sup>300</sup> Chapter 5: Deferred Prosecution Agreements.

<sup>301</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 9.

<sup>302</sup> Serious Fraud Office, Case Information - Rolls-Royce PLC. Available at: <https://www.sfo.gov.uk/cases/rolls-royce-plc/>

<sup>303</sup> *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018.

<sup>304</sup> City of London Police, Two employees sentenced for roles in £6.4 million bribery. Available at: <http://news.cityoflondon.police.uk/r/1020/two-employees-sentenced-for-roles-in-6-4-million>

offenders can and will be pursued alongside the prosecution of companies for failure to prevent offences. As identified in the previous section, there has been a very small number of cases in the UK and the model remains in its relative infancy, so the number of convictions secured against individual offenders may grow as awareness and implementation increase.

10.195 A final concern relates to possible confusion and uncertainty about the *Bribery Act* among SMEs. This concern has been recognised as the House of Lords Select Committee, appointed in 2018, has been tasked with examining the impact of the Act on SMEs. The joint submission by the Law Society, the City of London Law Society and the Fraud Lawyers Association states that it has anecdotal evidence of reduced levels of relevant training by SMEs as time has progressed. It suggests that the pre-occupation with GDPR has been a higher focus for many small business and that the extent of the take up and demand for certification standards such as ISO 37001:2016 Anti-bribery management systems would be a useful indicator of current awareness.<sup>305</sup> In relation to a lack of awareness among SMEs and generally, Transparency International has concluded, in its submissions to the Committee, that the UK Government should support business by continuing to collate and promote the most effective anti-bribery guidance and initiatives and should repeat its 2015 study into awareness of, and response to, the *Bribery Act* among SMEs in order to update the evidence base in this area.<sup>306</sup> It also suggests that the Government should highlight resources aimed at SMEs, which are less likely to be able to afford external advice and typically operate with less formal and structured policies and procedures, and often will be less well-resourced to manage bribery and corruption risk.<sup>307</sup> While the Committee is not due to report on its findings until 2019, it appears that the main reason for the confusion and uncertainty about the *Bribery Act* among SMEs is a lack of awareness and resources, which could be resolved through training and other awareness raising initiatives and through the provision of updated and tailored guidance and case studies.

#### **(e) Expansion of the Failure to Prevent Model**

10.196 In the UK, the *Bribery Act 2010* failure to prevent model has now been expanded to tax evasion offences, and it is proposed to expand it to corporate economic crime more generally. As the lead prosecutor for economic crime offences, the Serious Fraud Office has publicly suggested that the model of offence enacted in section 7 of the *Bribery Act 2010* be extended, creating in effect corporate liability for failing to prevent acts of

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<sup>305</sup> The Law Society, the City of London Law Society and the Fraud Lawyers Association, *House of Lords Committee on the Bribery Act – Responses to the call for Evidence* (1 August 2018) at 6. Available at: <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/bribery-act-evidence-submission/>

<sup>306</sup> Transparency International, *Bribery Act - Transparency International UK's submission of written evidence to the Select Committee on the Bribery Act 2010* (11 July 2018). Available at: <http://www.transparency.org.uk/publications/submission-bribe-select-committee/#.W4b1pehKics>

<sup>307</sup> *Ibid.*

financial crime by associated persons. In the words of former Serious Fraud Office Director, David Green, “[s]uch a change would greatly increase the SFO’s reach over corporates in appropriate cases”.<sup>308</sup>

10.197 Commentators have also argued that it would be rational and effective to bring corporate attribution for economic crime in line with the corporate failure to prevent offence in the *Bribery Act 2010*.<sup>309</sup> One such argument is that the application of the *Bribery Act 2010* organisational failure to prevent model to a broader range of economic offences could pave the way for the wholesale adoption of failure to prevent as a model for corporate liability.<sup>310</sup>

(i) *Expansion of the Failure to Prevent Model to Tax Evasion*

10.198 Part 3 of the UK *Criminal Finances Act 2017* created two corporate offences of failure to prevent facilitation of tax evasion: one of failure to prevent facilitation of UK tax evasion and the other of foreign tax evasion. These offences are subject to punishment by an unlimited fine.

10.199 Section 45 of the 2017 Act relates to the failure to prevent facilitation of UK tax evasion offences. A “relevant body” (“B”) (which means bodies corporate and partnerships, not individual persons) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B. “Associated person” is defined as any individual or corporation that performs services for or on behalf of B. The offence must have been carried out in the capacity of the association with B. The relevant body and the associated person can be located in the UK or overseas provided that UK taxes are evaded. The Act does not require the associated person to have been convicted of the offence. Section 46 covers the failure to prevent facilitation of foreign tax evasion offences.

10.200 Similar to the *Bribery Act 2010* model, both sections 45 and 46 are strict liability offences: neither the relevant body nor its senior management need to have participated in, known about, or suspected the facilitation or the evasion for the relevant body to be criminally liable. It is also a defence for the body to prove that, when the tax evasion facilitation offence was committed, it had in place such prevention procedures as it was reasonable in all the circumstances to expect it to have in place, or it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.<sup>311</sup>

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<sup>308</sup> Wells, “Corporate failure to prevent economic crime – a proposal” (2017) Crim LR 6, at 426; SFO Speech, Pinsent Masons Regulatory Conference 2014. Available at: <https://www.sfo.gov.uk/2014/10/23/david-green-cb-qc-speech-pinsent-masons-regulatory-conference/>

<sup>309</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) Law and Financial Markets Review, at 5; Wells, “Corporate failure to prevent economic crime – a proposal” (2017) Crim LR 6, at 426.

<sup>310</sup> Wells, “Corporate failure to prevent economic crime – a proposal” (2017) Crim LR 6, at 428.

<sup>311</sup> *Criminal Finances Act 2017*, sections 45 and 46.

10.201 The *Bribery Act 2010* has influenced the tax evasion offences in the 2017 Act, although the wording of the defence differs. While the bribery defence centres on adequacy, the defence for tax evasion is based on reasonableness, and it remains unclear how to distinguish between the two.<sup>312</sup> It appears that the bribery defence may not have been adopted for the tax evasion offences due to lobbying from financial institutions providing a driver to adopt reasonableness, as apparently a less onerous standard.<sup>313</sup> The Guidance on the failure to prevent tax evasion adds to the confusion in how to differentiate the two as the adoption of reasonableness in preference to adequacy appears to have been briefly forgotten;<sup>314</sup> it states that merely applying old procedures tailored to a different type of risk (or clients-focused procedures) will not necessarily be an “adequate” response to tackle the risk of tax evasion facilitation.<sup>315</sup>

10.202 In contrast to the *Bribery Act 2010*, there is no need in the 2017 Act offences for benefit to be intended or to accrue in respect of a tax evasion offence. Requiring proof of benefit or intention of this would ensure a link between the associated person’s actions and the corporation, and would exclude those acting against the wishes or aims of the corporation.<sup>316</sup> The omission of this requirement may increase corporate accountability by further incentivising the introduction of rigorous compliance and risk preventive policies. It may be for these reasons that the legislature did not include a requirement of benefit; the associated person must be providing services for or on behalf of the corporation.<sup>317</sup>

(ii) *Further Extension of the ‘Failure to Prevent’ Model*

10.203 The UK Anti-Corruption Plan, published in 2014, committed to the Ministry of Justice undertaking an examination of the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more broadly.<sup>318</sup> The Ministry of Justice issued a call for evidence on corporate liability for economic crime, which closed in March 2017. The Ministry of Justice’s call for evidence on corporate liability for economic crime sets out 5 options for reform, which include two variations of the failure to prevent model as well as alternatives to the further expansion of the model.<sup>319</sup>

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<sup>312</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 5.

<sup>313</sup> *Ibid.*

<sup>314</sup> HM Revenue and Customs, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* (2017).

<sup>315</sup> *Ibid* at 27.

<sup>316</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 5.

<sup>317</sup> *Ibid.*

<sup>318</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 8.

<sup>319</sup> *Ibid* at 16-18.

- 10.204 Option 1 would involve the amendment of the identification doctrine through legislating to amend the common law rules. By way of an example, it was suggested that legislation could amend the identification doctrine by broadening the scope of those regarded as a directing mind of a company.<sup>320</sup> The call for evidence stated that option 1 would encourage corporate efforts to limit potential liability through the adoption of evasive internal structures.<sup>321</sup> It warned that it would not promote the prevention of economic crime through the adoption of corporate good governance.<sup>322</sup>
- 10.205 Option 2 would involve the creation of a strict liability offence based on the principles of vicarious liability to make the company guilty, through the actions of its employees, representatives or agents, of the substantive offence, without the need to prove any fault element such as knowledge or complicity at the corporate centre. The call for evidence warned that it would need to be considered whether option 2 should be subject to a due diligence type defence if it were to be effective as a means of incentivising economic crime prevention as part of corporate good governance.<sup>323</sup>
- 10.206 Option 5 relates to investigating the possibility of regulatory reform on a sector-by-sector basis in order to deter misconduct through strengthening individual accountability, particularly at senior manager level.<sup>324</sup> However, this may involve the duplication of resources and efforts across different sectors.
- 10.207 Commentators have identified issues with Options 1, 2 and 5 including difficulties that would be posed by amending the identification doctrine (Option 1),<sup>325</sup> excessive broadness (Option 2)<sup>326</sup> and a reluctance to maintain the status quo as well as concerns regarding the resource commitment (Option 5).<sup>327</sup>
- 10.208 Options 3 and 4 are two variations of the failure to prevent model. Option 3 proposed a separate strict (direct) liability offence of failure to exercise supervision similar to section 7 of the *Bribery Act 2010*. With a due diligence defence, this would in effect replicate the section 7 failure to prevent offence.
- 10.209 Option 4 would involve amending the substantive offence to include failure to prevent. This would involve amending Option 3 to place the burden of proof on the prosecution rather than the defence. This would be a restriction on the current versions of the failure to prevent model in the *Bribery Act* and *Criminal Finances Act 2017* as the shift of the

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<sup>320</sup> *Ibid* at 17.

<sup>321</sup> *Ibid* at 17.

<sup>322</sup> *Ibid* at 17.

<sup>323</sup> *Ibid* at 17.

<sup>324</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 18.

burden of proof would require the prosecution to prove that a company has not implemented adequate measures to prevent economic crime. The removal of the reverse onus defence on the defence to prove the adequacy of preventive measures could pose issues as much of the relevant evidence would likely be solely within the knowledge of the defendant and the offence would, therefore, become more difficult to prosecute if the burden of proof was shifted onto the prosecution.

10.210 A criticism put forward of Option 3 is that it raises questions of proportionality and predictability as large, complex organisations would have to prove that they have the internal controls aimed at preventing economic crime.<sup>328</sup> It has also been noted that unlike the *Bribery Act*, which is tailored to address bribery-related offences, and the tax evasion offence under the Criminal Finances Act 2017, which is tailored to prevent tax evasion, the scope of non-bribery and non-tax related corporate economic crime could be very broad.<sup>329</sup> However, a number of arguments in favour of the failure to prevent model of corporate liability in Option 3 have also been put forward including that it is far less restrictive than the identification model, it is not as discriminate as pure vicarious liability due to the adequate procedures defence and it is already successfully in place for bribery offences.<sup>330</sup> It has also been argued that the organisational failure to prevent mode of liability should be extended to other economic crimes on the basis that the DPA and sentencing regimes already group these crimes together; that financial and economic crimes are often international in scope and warrant such a reaction, and that harmonisation via international bodies like the OECD, the UN and the EU is under way already.<sup>331</sup>

10.211 Transparency International has stated that the option 3 approach is proportionate and balances improved accountability, improved governance, and limited cost for business.<sup>332</sup> Campbell advocates the rollout of this model to other offences, but would remove the possibility of the negotiation of DPAs in conjunction with it.<sup>333</sup> Campbell concludes that omissions liability represents a useful tool in addressing corporate wrongdoing and states, “...It is hard to discern a rationale for addressing bribery and tax evasion only, and, beyond this, why any extension should be limited to economic crimes”.<sup>334</sup>

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<sup>328</sup> The Law Society of England and Wales, *Ministry of Justice: Call for Evidence on Corporate Liability for Economic Crime – The Law Society of England and Wales Response* (March 2017) at 4.

<sup>329</sup> *Ibid.*

<sup>330</sup> Wells, “Corporate failure to prevent economic crime – a proposal” (2017) *Crim LR* 6, at 439.

<sup>331</sup> *Ibid.*

<sup>332</sup> Transparency International UK, *Corporate Liability for Economic Crime – Submission from Transparency International UK* (March 2017) at 9.

<sup>333</sup> Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) *Law and Financial Markets Review*, at 10.

<sup>334</sup> *Ibid.*

**(f) Adoption of the Failure to Prevent Model in Ireland***(i) The Criminal Justice (Offences Relating to Information Systems) Act 2017*

10.212 The failure to prevent model has recently been adopted in this jurisdiction through the enactment of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*. Section 9 of the Act provides for two mechanisms for attributing liability for an offence under the Act to a corporate body. Section 9(1) of the Act provides a mechanism that is specifically designed to give effect to article 10.2 of the *EU Directive on attacks against information systems*,<sup>335</sup> which allows liability to be imposed upon the corporate body based upon its failure to prevent the contingent offending of a person acting on behalf of the corporate body.

10.213 Article 10.2 of the Directive requires Member States, including Ireland, to “ensure that legal persons can be held liable where the lack of supervision or control by a person [...] has allowed the commission, by a person under its authority”. In order to effectively transpose article 10.2 into Irish law, the legislation specific model of corporate criminal liability found in section 9(1) was included in the Act. This subsection provides that a corporate body shall be guilty of a relevant offence where:

- (1) the offence is committed for the benefit of a body corporate,
- (2) by an agent or subsidiary of the corporate body,<sup>336</sup>
- (3) its commission being attributable to the failure to exercise sufficient supervision or control over that agent or subsidiary, by certain office or function holders within the corporate body.<sup>337</sup>

10.214 The liability imposed upon the corporate body under this provision is vicarious in nature, as it is derived from the wrongful conduct and fault of persons other than the corporate person. Unlike other, broader, vicarious liability models considered above, in addition to the fault and conduct element of principal offender needing to be proved, a failure to act reasonably on the part of senior members of the corporate body’s management, which causatively resulted in the principal offending, must also be proved.

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<sup>335</sup> *Directive 2013/40/EU of the European Parliament and the Council of 12 August 2013 on attacks against information systems*. Section 9(3) also provides for derivative liability to be imposed upon certain agents of the corporate body who *consented to or connived in* the commission of the offence by the corporate body, or the body’s offending was attributable to any willful neglect on that agent’s part (this form of derivative liability will be considered further in Chapter 9: Liability of Corporate Managerial Agents).

<sup>336</sup> The offence must be committed by a “relevant body”, which subsection (5) defines as “a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, or [...] an employee, subsidiary or agent of the body corporate”.

<sup>337</sup> These officer or function holders being “a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity”.

10.215 Section 9(1) does not require proof of any fault on the part of the corporate body, and as such is a strict liability offence. Section 9(2) provides the corporate body defendant with a due diligence defence where it can prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

10.216 The aim of article 10.2, and section 9(1) and (2), is to drive corporate bodies to ensure that they have mechanisms in place to ensure that their management prevent employees and subsidiaries committing offences under the Act.<sup>338</sup> The effect of section 9(1), however, is to allow a corporate body to be held liable for a substantive offence under the Act based upon the objective fault of a separate person/s – members of its management.

10.217 The failure to prevent model set out in section 9(1) may pose similar issues to the Nattrass identification doctrine. Unlike the failure to prevent offence provided by section 7 of the UK *Bribery Act 2010* (considered below), section 9(1) does not criminalise organisational faults in a corporate body’s systems or policies that result in offending in general, but rather confines the scope of the fault, which leads to offending, to errors in supervision by persons at the high end of a corporate body’s managerial structure. This has the effect of unduly limiting the imposition of liability and potentially rendering smaller, less organisationally complex corporate bodies more susceptible to being held liable than larger, more complex corporate structures. As part of the intended effect of the 2017 Act is to ensure “an adequate level of protection and security of information systems by legal persons”,<sup>339</sup> the potential issues posed by the failure to prevent model of liability attribution mechanism provided under section 9(1) and (2), as well as the issues with the common law doctrine recognised by section 9(4)(b),<sup>340</sup> mean that this section 9 may not be fully successful in achieving this intended effect.

(ii) *The Criminal Justice (Corruption Offences) Act 2018*

10.218 There appears to be movement towards the expansion of the failure to prevent model in this jurisdiction as the *Criminal Justice (Corruption Offences) Act 2018* provides for an offence of failing to prevent. Section 18 of the 2018 Act provides that a body corporate will be guilty of an offence, if an offence under the new Act is committed by an officer,<sup>341</sup> employee, agent or subsidiary of that body corporate with the intention of obtaining or retaining business for the body corporate, or an advantage for it in the conduct of its business. It will be a defence for a body corporate to prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

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<sup>338</sup> Recital (26) of the Directive indicates that the aim of this provision is, at least in part, to drive appropriate levels of protection from the threat of cybercrime.

<sup>339</sup> Recital (26) of *Directive 2013/40/EU*.

<sup>340</sup> See Chapter 8.

<sup>341</sup> An “officer” includes a director, manager, secretary or other officer of the corporate body, a person purporting to act in that capacity, and a shadow director.



10.219 The offence in section 18 of the 2018 Act is comparable to section 7 of the UK *Bribery Act 2010* in that a commercial organisation is held liable for its failure to prevent a person associated with it from committing an offence under the act. Unlike section 9(1) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*, liability for the section 18 offence is not contingent on the failure of an officer of a body corporate, or a person purporting to act in that capacity, to exercise the requisite degree of supervision or control of the relevant person. Like section 7 of the UK *Bribery Act 2010*, liability will be attributed under section 18 of the 2018 Act based on organisational faults in a corporate body's systems or policies that will not give rise to the same identification doctrine concerns as the *Criminal Justice (Offences Relating to Information Systems) Act 2017*. The section 18 model may therefore be more effective in ensuring compliance and incentivising good governance.

**(g) Formation of the failure to prevent model in Ireland**

10.220 While it may be justifiable to use the failure to prevent model for a specific offence, or in a specific piece of legislation this model may not be suitable for use as a generic general scheme of corporate liability attribution. The effect of applying this model generally would be to place an extremely onerous, strict general duty on the corporate body to prevent all offending. As already examined, particularly in circumstances in which the model does not require the contingent offending to be for the benefit of the corporate body, this may result in unfairness. It may therefore be more appropriate for the failure to prevent model to be available not as a general model but as a model for strict liability offences that could be applied on a case-by-case basis. The use of the failure to prevent model may prove to be significantly effective for certain offences as it has a number of important advantages such as the availability of a due diligence defence that incentivises corporations to invest resources into compliance. It is also substantially easier to prosecute a corporation for failing to prevent criminal activity than prosecuting for carrying out the substantive criminal act itself, as the identification doctrine issues are avoided and the reverse burden provision under the failure to prevent model eases the burden on the prosecution. While the failure to prevent model may not be suitable for all offences or in all circumstances, it could be widely applicable and should be available as a default model rather than a general model.

**R 10.04 The Commission recommends that a failure to prevent model should be available, on a case-by-case basis, as an alternative to a due diligence model for strict liability offences.**

10.221 In circumstances in which it cannot be proven that a corporation is directly liable for the prohibited act itself, holding a corporation to account for its failure to prevent the commission of a prohibited act is preferable to not holding a blameworthy corporation to account for its actions at all. Such a corporation is blameworthy on the basis of its omissions in failing to have adequate policies, systems and controls in place to prevent the criminal activity. Holding a company liable for its failure to prevent criminal activity is important due to the effects of such a model of liability on promoting compliance.

10.222 Such a model is also important due to its deterrent effect. The potential for a corporation to be held liable for its failure to prevent criminal activity, for example the failure to

prevent bribery, may have a comparable reputational impact, and therefore deterrent effect, as if the corporate body was convicted of the substantive offence (active bribery). However, it is important to clarify that the failure to prevent model should only be employed where it is not possible to secure a conviction of the corporation for the substantive offence itself. The failure to prevent model should also not be allowed to replace the holding to account of individual offenders. Every effort should be made to secure a prosecution of the directing minds of the corporation and any other offending officers.

**R 10.05 The Commission recommends that the failure to prevent model should be used only in circumstances where it is not feasible to hold a corporate body or its directing minds liable for a substantive offence.**

(i) *Appropriate form of due diligence defence*

10.223 As we have seen, there are various forms of reverse burden due diligence defence built into the existing and proposed failure to prevent models in the UK and in this jurisdiction. The applicable forms of “adequate procedures” or “prevention procedures” that were “reasonable in all the circumstances” and “all reasonable steps and all due diligence” are discussed in further detail below.

Adequate Procedures (UK Bribery Act 2010, section 7)

10.224 Section 7 of the UK *Bribery Act 2010* provides that if a defendant company had in place procedures that, if followed, are adequate to prevent persons associated with it from committing bribery, it is entitled to a full defence.<sup>342</sup> This adequate procedures defence is designed to focus the use of criminal sanctions on cases where the offence has occurred as a result of a failure of prevention procedures. Where a company has put risk based adequate procedures in place to prevent offending, it would be unjust to sanction the organisation for wrongdoing that manifestly and deliberately flouts those procedures.

10.225 The UK Ministry of Justice Guidance states:

“These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multinational enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.”<sup>343</sup>

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<sup>342</sup> UK Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (2017) at 20.

<sup>343</sup> UK Ministry of Justice, *The Bribery Act 2010 – Guidance* (2011) at 20.

10.226 The Guidance is formulated around six principles, each followed by commentary and examples.

- (1) The first principle requires the company to implement procedures to prevent bribery that are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. It is up to the company itself to measure that risk. This not only necessitates an adequate risk assessment of the company itself, but also that of its agents and those contracted by it.
- (2) The second principle stipulates that there should be top-level commitment, i.e. commitment by the top-level management of the organisation, to prevent bribery committed by persons associated with it – this is also known as the 'tone from the top'. This at least includes communication of the organisation's anti-bribery stance, and an appropriate degree of involvement in developing bribery prevention procedures.
- (3) The third principle states that the organisation should carry out a periodic, informed and documented assessment of the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The Ministry of Justice Guidance categorises the external risks into five broad groups, which are country, sectoral, transaction, business opportunity and business partnership risks.
- (4) The fourth principle states that the commercial organisation should apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
- (5) The fifth principle stipulates that the company communicates its bribery prevention policies and procedures throughout the organisation, both internally and externally; and that the company makes sure that these policies and procedures are embedded and understood by everyone, e.g. by training procedures.
- (6) The sixth and final principle provides that the organisation should periodically monitor and review procedures designed to prevent bribery by persons associated with it, and make improvements where necessary.<sup>344</sup>

10.227 As discussed earlier in this chapter, there has yet to be any judicial articulation or confirmation of what measures constitute "adequate procedures" in practice. However, the first contested prosecution under section 7 of the *Bribery Act 2010*<sup>345</sup> recently

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<sup>344</sup> UK Ministry of Justice, *The Bribery Act 2010 – Guidance* (2011) at 20.

<sup>345</sup> *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018.

concluded resulting in a conviction and although no judicial commentary was given, it is possible to gain some understanding of that the Crown Prosecution Service's understanding of "adequate procedures" from its submissions. The Crown Prosecution Service argued that the defendant company did not have adequate procedures in place as:

- Incomplete compliance records were held by the company, there was no designated compliance officer to whom staff could report concerns and there were few records of efforts to foster a culture of compliance;
- The company had failed to enact any specific procedures (such as an anti-bribery policy) in compliance with the changes in the law brought about by the Bribery Act or its related Guidance; and
- There was no evidence of active staff training or communication to ensure that staff had accessed, read, or were even aware of the company's existing policies.<sup>346</sup>

Prevention procedures that were reasonable in all the circumstances (UK *Criminal Finances Act 2017*)

10.228 Section 45 of the UK *Criminal Finances Act 2017* provides a defence for the accused body to prove that, when the tax evasion facilitation offence was committed, it had in place such prevention procedures as it was reasonable in all the circumstances to expect it to do so, or it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

10.229 As already noted, the bribery defence centres on adequacy while the defence for tax evasion is based on reasonableness, and it remains unclear how to distinguish between the two.<sup>347</sup> It appears to be the case that the defences were not standardised due to lobbying from financial institutions, which provided the driver to adopt reasonableness, as apparently a less onerous standard.<sup>348</sup> It has also been noted that what constitutes "reasonable procedures" and how this is evidenced remain ambiguous.<sup>349</sup> In reference to the due diligence defence of reasonable procedures, the Guidance<sup>350</sup> states that merely applying old procedures tailored to a different type of risk (or clients-focused procedures) will not necessarily be an "adequate" response to tackle the risk of tax evasion facilitation<sup>351</sup> which can only serve to add to the ambiguity.

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<sup>346</sup> *R v Skansen Interiors Limited*, Southwark Crown Court, 21 February 2018.

<sup>347</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 5.

<sup>348</sup> *Ibid.*

<sup>349</sup> Campbell, "Corporate Liability and the Criminalisation of Failure" (2018) *Law and Financial Markets Review*, at 5.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid* at 27.

All reasonable steps and all due diligence (*Criminal Justice (Offences relating to Information Systems) Act 2017* and the *Criminal Justice (Corruption Offences) Act 2018*)

10.230 Under the *Criminal Justice (Offences Relating to Information Systems) Act 2017*<sup>352</sup> and the *Criminal Justice (Corruption Offences) Act 2018*,<sup>353</sup> it will be a defence for a body corporate to prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.” Section 7 of the *UK Bribery Act 2010* refers to the body corporate having “had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct.” While the language of the defence differs, it appears that Irish corporations may be held to a higher standard as having taken “all reasonable steps and exercised all due diligence” appears to be a narrower defence than that of having in place “adequate procedures”. However, it may be that similar factors will be taken into account in deciding whether a corporation has met the requisite requirements. However, this remains to be seen upon further guidance from the Oireachtas or upon interpretation of the defence by the courts.

10.231 It is the Commission’s view that a due diligence defence could include language such as “adequate procedures”, “adequate supervisions”, “reasonable measures to prevent” or “all reasonable steps and all due diligence” and that it is likely that that there is very little distinction between the various formations as all are likely to require similar conduct or steps to have been taken in order to satisfy the defence. However, the Commission recommends that the appropriate form of due diligence defence to be applied to any failure to prevent model in this jurisdiction would be “all reasonable steps and all due diligence”. Given that this form of due diligence defence already features in the *Criminal Justice (Offences Relating to Information Systems) Act 2017* and the *Criminal Justice (Corruption Offences) Act 2018*, it would be appropriate to apply the same form of defence to any general failure to prevent model in the interests of consistency and certainty. Usage of the same form of defence could lead to certainty regarding the standards necessary to satisfy the defence. In the event of any governmental guidance or judicial articulation being provided on the meaning of the defence, and the measures necessary to satisfy the defence, in relation to any application of the failure to prevent model in this jurisdiction, such guidance or judicial articulation would then provide clarity and certainty for the application of the failure to prevent model generally. This would provide certainty to the law and may also result in higher levels of compliance as corporations would have an awareness of the precise measures necessary to constitute reasonable steps and all due diligence. With regard to establishing the measures required to satisfy the defence, the Commission recommends that it should be for the relevant regulators to set out clear guidance in the context of relevant business or industry

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<sup>352</sup> Section 9(2) provides the corporate body defendant with a due diligence defence where it can prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

<sup>353</sup> Section 18 provides that it will be a defence for a body corporate to prove that it “took all reasonable steps and exercised all due diligence to avoid the commission of the offence.”

practice. Regulatory codes such as the *Corporate Governance Code for Credit Institutions and Insurance Undertakings 2013* may serve as exemplars of such guidance.

- R 10.06 The Commission recommends that any due diligence defence, including in a failure to prevent liability model, should feature a general form of due diligence defence which will be satisfied upon a corporate body having taken all reasonable steps and exercised all due diligence to prevent the relevant criminal offence.**
- R 10.07 The Commission recommends that the general form of due diligence including that applicable to the failure to prevent model, should be that “a relevant person had taken all reasonable steps and to exercise all due diligence to prevent any relevant criminal activity”.**
- R 10.08 The Commissions recommends that where a regulator has jurisdiction in connection with an offence to which a due diligence defence applies, the regulator should provide guidance, which may take the form of a statutory code, setting out measures required to satisfy the due diligence defence.**

(ii) *Definition of “relevant” or “associated” person*

10.232 A “relevant person” is defined under section 9(5) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017* as a director, manager, secretary or other officer of the body corporate or a person purporting to act in that capacity. The definition also includes an employee, subsidiary or agent of the body corporate. Similarly, section 18 of the *Criminal Justice (Corruption Offences) Act 2018* provides that a body corporate will be guilty of an offence if an offence under the Act is committed by an officer,<sup>354</sup> employee, agent or subsidiary of that body corporate with the intention of obtaining or retaining business for the body corporate, or an advantage for it in the conduct of its business. An “officer” includes a director, manager, secretary or other officer of the corporate body, a person purporting to act in that capacity, and a shadow director.

10.233 This is in contrast with the *UK Bribery Act 2010* definition of “associated person” as a person who “performs services” for or on behalf of the organisation.<sup>355</sup> This person may be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation is irrelevant, meaning that employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, clearly states that the question as to whether a person is performing services for an organisation is to be determined “by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between [the organisation and the person]”. The concept

<sup>354</sup> An “officer” includes a director, manager, secretary or other officer of the corporate body, a person purporting to act in that capacity, and a shadow director.

<sup>355</sup> *UK Bribery Act 2010*, section 8.

of a person who “performs services for or on behalf of” the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf.

10.234 Such is the broadness of the scope of the definition that it could be interpreted as encompassing contractors and other service providers who “perform services” for or on behalf of the organisation. If the same definition were to be adopted in the Irish context, this could pose an issue due to the potential for the relevant person or entity to be somewhat remote from the corporation. It would likely be constitutionally impermissible for a corporation to be held liable for the actions of a person or entity that is so remote from the organisation itself. In such circumstances, the corporation would unlikely be in a position to control the actions of a contractor or service provider other than setting out clear terms in any contracts for services. If a corporation were to be rendered liable to potentially severe criminal sanctions in circumstances in which it could not control the actions of a contractor and was not blameworthy, it may, therefore, make any trial of such a corporation not one held in due course of law and, thus, contrary to Article 38.1 of the Constitution.<sup>356</sup> It would therefore be appropriate for the narrower definition of “relevant person”, as provided for in the *Criminal Justice (Offences Relating to Information Systems) Act 2017*, to be adopted for any failure to prevent liability offences.

**R 10.09 The Commission recommends that “relevant person”, in relation to a corporate body, should be defined as:**

- (1) a director, manager, secretary or other officer of the corporate body,**
- (2) a person purporting to act in that capacity,**
- (3) a shadow director (comparable to the definition in the *Companies Act 2014*) of the corporate body, or**
- (4) an employee, agent or subsidiary of the corporate body.**

(iii) *Nature of the Omission*

10.235 In order to avoid similar issues to those posed by the identification doctrine, any failure to prevent model should criminalise organisational faults in a corporate body’s systems or policies which result in offending<sup>357</sup> rather than confining fault to failures in supervision by specific individuals at the high end of the managerial structure. As earlier identified, section 9(1) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017* is such an offence under which liability is contingent on errors in supervision by persons at the high end of a corporate body’s managerial structure. This has the effect of unduly

<sup>356</sup> *In the Matter of Article 26 of the Constitution and in the Matter of the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>357</sup> UK *Bribery Act 2010*, section 7 model.

limiting the imposition of liability and potentially rendering smaller, less organisationally complex corporate bodies more susceptible to being held liable than larger, more complex corporate structures. Such a failure to prevent model of liability would likely therefore be less successful in attributing liability to larger corporations for failures to prevent criminal activity. As a result of the lesser likelihood of conviction, corporations would be less incentivised to ensure that they have adequate policies, systems and controls in place to prevent criminal activity. Such failure to prevent models would therefore be less effective in reducing promoting compliance and good governance. In order to avoid such issues, any failure to prevent model should instead criminalise cultural or organisational faults in a corporate body's systems or policies that result in offending or failings in supervision by any "relevant person" with policy making responsibilities within the corporate body's managerial structure.

**R 10.10 The Commission recommends that any general failure to prevent model of liability should involve imposing criminal liability for either (a) cultural or organisational failings in a corporate body's systems or policies which result in offending or (b) failures in supervision by any "relevant person" with policy making responsibilities within the corporate body's managerial structure.**

(iv) *Purpose of the criminal act*

10.236 In circumstances in which a failure to prevent model does not require the contingent offending to be for the benefit of the corporate body, this may result in unfairness<sup>358</sup> as a corporation may be held liable for failing to prevent the actions of a rogue employee in circumstances in which the actions may not have been carried out for the benefit of the corporation. Sections 9(1) and (2) of the *Criminal Justice (Offences Relating to Information Systems) Act 2017* overcome this particular potential difficulty by requiring that the contingent offence be committed for the benefit of the corporate body, as an express proof of the corporate liability mechanism.

**R 10.11 The Commission recommends that a corporate body should be held criminally liable for failures to prevent criminal activity only where such activity was carried out for the benefit of the corporate body or for the benefit of a "relevant person" or a client of the corporate body.**

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<sup>358</sup> Wells, "Corporate criminal liability: a ten year review" (2014) Crim LR, at 864; Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at 108-9.



## D. Due Diligence and Individuals in a Corporate Context

### 1. General due diligence defence for individual managerial liability

10.237 This section discusses whether a general due diligence type defence should be made available to individual managers and officers for certain corporate offences.

#### (a) Fault-based offences

10.238 Fault-based offences have been detailed earlier in this Report. In order to avail of a due diligence defence, the act causing the offence must not have been consciously, recklessly or wilfully blindly committed by the accused. It would be inappropriate to provide a defence for a corporate body that it “took all reasonable precautions to avoid commission of the offence”, but then maintain that it intentionally committed the offending conduct in spite of those precautions. For this reason, an individual cannot avail of a due diligence defence for an offence that requires proof of subjective fault. One submission specified that a due diligence defence should not be applied to offences where the accused consented or connived in the conduct of offences, as these require intentionality.

#### (b) Strict and absolute liability offences

10.239 As previously examined, strict and absolute liability offences are exceptions to the general rule that the criminal law will not seek to impose liability upon a person who is not morally blameworthy, or in some other way at fault, for some criminal conduct or result.

10.240 The nature of absolute liability offences is that they are prosecuted on proof of performance of a prohibited act alone without the availability of any defences. It would therefore be inappropriate for a defence of due diligence to be open to individual defendants in prosecutions of absolute liability offences. It is arguable that a due diligence defence should be available to some offences which are currently classified as absolute in nature which would involve the reclassification of such offences as ones of strict liability. However, any application of a defence to such offences should be decided on a case-by-case basis. There is also some agreement in the submissions that a due diligence defence is not appropriate where an offence is intended to apply absolute liability.

10.241 The availability of a due diligence defence for individuals prosecuted for strict liability offences is appropriate as it allows the harshness of strict liability provisions to be offset by allowing the individual to show that the offence occurred despite reasonable steps being taken to ensure compliance. The submissions are generally, but not universally, in favour of the applicability of a due diligence defence to strict liability offences.

#### (c) Conclusion

10.242 While it would be appropriate to apply a due diligence defence to strict liability offences, such a defence would be unsuitable for fault-based and absolute liability offences. It would therefore be inappropriate to use a single general defence for a wide array of

disparate offences, particularly as these offences are based upon different culpability requirements.

**R 10.12 The Commission recommends that a due diligence type defence should be available to “relevant persons” for strict liability type offences.**

## **2. How Due Diligence Defences Would Apply to Managerial Liability**

10.243 In Chapter 9, it has been outlined that the Commission is in favour of the introduction of a generally applicable scheme of derivative corporate managerial agent liability. This recommended scheme allows for the effective and accurate application of derivative liability based upon the culpability and wrongful acts or omissions of corporate managerial agents who contribute to corporate offending, in circumstances in which it is uncertain whether the current body of law could, and in circumstances in which the current body of criminal law definitively could not. This section will examine whether a due diligence defence ought to be available to corporate managerial agents in respect of their secondary offending under this new scheme.

### **(a) Due diligence and the fault element of a new scheme**

10.244 The Commission recommends, in Chapter 9, that the format of a new scheme should provide for its fault and conduct elements separately, and that derivative liability may be imposed where a managerial agent contributes to corporate offending, with the following levels of culpability:

- intention/knowledge;
- subjective recklessness/wilful blindness;
- gross negligence; or
- simple negligence/constructive knowledge.

10.245 As outlined in Chapter 9, in order for this scheme to avoid criticisms of disparity of culpability and unfair labelling, the proposed scheme requires that the level of fault required of a managerial agent should, in any particular prosecution under the scheme, track the level of fault required of the principal offender for the substantive offence in the case of subjective and objective fault based offences. In the case of such substantive offences which have fault elements that fall outside the list above, the fault element which must be proved of the managerial agent will be the fault requirement listed above which most closely represents a level of culpability required by the substantive offence, without allowing liability to be imposed upon the managerial agent based upon a lower level of culpability. In so providing, the recommended scheme allows for derivative liability to be imposed in these exceptional cases, without the agent suffering as a result of a disparity of culpability.

10.246 In relation to whether to whether a due diligence defence should be available for offences with the above fault elements, a defence of due diligence should only be available for

strict liability offences under the proposed scheme. As regards subjective fault based offences, it would be inappropriate for a defence of due diligence to apply where the secondary offender had knowingly or intentionally allowed an offence to occur. It could not reasonably be argued that a defendant had exercised all due diligence to prevent the prohibited act in circumstances in which they had carried out the act knowingly or intentionally. In the case of objective fault based offences, a due diligence type defence may also be inappropriate but for a quite different reason. This is because the nature of such an offence, for example a negligence based offence, implicitly involves failure to take reasonable care with the onus on the prosecution to establish such failure.

**(b) The application of a due diligence defence to derivative liability for strict and absolute liability offences**

10.247 As set out in Chapter 9, in relation to strict liability offences, it is often the case that the statutory defence provided relates to the defendant demonstrating some specific state of affairs or conduct. Proving such a defence will have the effect of rendering the defendant's conduct, which has satisfied the conduct element of the offence, less morally blameworthy. Under the recommended scheme, the managerial agent's liability does not flow from satisfying the conduct element of the substantive offence, but rather, it flows from separate contributory conduct, to which a statutory defence may not relate.

10.248 It is for this reason that the recommended scheme provides that in a case where the substantive offence is one of strict or absolute liability, no proof of culpability will be required of a managerial agent in order to impose derivative liability, but an agent will have access to a general defence. In such a prosecution, the obligation will remain on the prosecution to prove the commission of the substantive offence, and the managerial agent's contributory conduct. This defence can be accessed where a defendant can prove that:

- (1) he or she was not operating with authority or control in relation to the conduct of the corporate body (or other prescribed undertaking), or its agents, which forms the basis of the conduct element of the substantive offence; or
- (2) he or she acted reasonably in relation to the operation of his or her authority or control over the conduct of the corporate body (or other prescribed undertaking), or its agents, as a managerial agent:
  - a. in relation to the corporate body's commission of the conduct element of the substantive offence; or
  - b. in relation to the corporate body's failure to satisfy any defence provided for in relation to the substantive offence.

10.249 In relation to absolute liability offences, all that is required in a prosecution of such an offence is proof of some specific prohibited conduct on the part of a defendant. It would therefore be inappropriate for a due diligence type defence to apply for such offences. As the above defence can be satisfied by a defendant proving that he or she acted reasonably in relation to the operation of his or her authority or control, a due diligence defence may

be unnecessary as the same standard would likely be established, in setting out that he or she acted reasonably, as the defendant would likely argue that he or she had taken all reasonable steps to prevent the offending. Nonetheless, a due diligence defence should apply to strict liability offences under the proposed scheme as there may be instances in which legislative provisions are not explicitly clear on whether or not an offence is one of strict liability and, therefore, whether the strict liability defence and rebuttable presumption provided under the model apply. While a due diligence defence may serve to duplicate the effects of the strict liability defence and rebuttable presumption, it is important for the purposes of clarity and certainty to provide that, in cases where it is unclear whether an offence is one of strict liability, the legislation stipulates the provisions to which a due diligence defence applies. An example of such a provision which lacks explicitness is section 41 of the *Consumer Protection Act 2007* which sets out when a commercial practice may be unfair but leaves it unclear which practices amount to “unfair practices”. It could refer to any range of offences from mispricing to fraud and, therefore, it would be helpful to provide for a due diligence defence and to stipulate the offences to which such a defence would apply.

**(c) Due diligence and the conduct element of the proposed scheme**

10.250 As a scheme of derivative liability, the blameworthiness of the person who will be subject to this scheme will come about due to his or her culpable contribution to, or facilitation of, the offending of another party. The Commission is therefore recommending in Chapter 9 that proof of the commission of a principal offence by a corporate body or undertaking (but not necessarily that it was prosecuted, either successfully or at all) form part of the conduct element of this scheme. In addition, the Commission recommends that the conduct element of this scheme must require proof of some conduct on the part of a defendant which contributed to, or facilitated, the principal offence. In Chapter 9, the Commission also recommends that the range of conduct, which such a derivative liability mechanism should cover, must include:

- (1) positive acts of agreement to or approval of the substantive offending;
- (2) tacit agreement or acquiescence to the substantive offending; or
- (3) failing to prevent the substantive offending.

10.251 As regards positive acts of agreement to or approval of the substantive offending, it would be inappropriate for a due diligence defence to apply in respect of such conduct as positive acts of agreement or approval would require intention or knowledge on the part of the defendant. Intention or knowledge would be incompatible with a defence that the defendant had taken all reasonable steps to prevent the conduct. Therefore, it could not be argued that the defendant had taken all reasonable steps to prevent the offending. In circumstances in which an accused acted negligently in tacitly agreeing or acquiescing to the substantive offending, the availability of a due diligence defence would be inappropriate. However, an accused could seek to satisfy the rebuttable presumption, provided for under the scheme, in such cases.

10.252 A due diligence defence would generally be appropriate for a strict liability offence where it was alleged that a defendant had failed to prevent the substantive offending. Under the proposed scheme, a rebuttable presumption would also apply to such offences which would enable a defendant to demonstrate that he or she did not satisfy the conduct element. In prosecutions under this scheme where the substantive offence is a strict or absolute liability offence, the presumption placed upon the managerial agent by the reverse burden provision would be rebutted where the agent can demonstrate that he or she does not satisfy the contributory conduct aspect of the conduct element of the recommended scheme. This is in contrast with prosecutions under the scheme for other offences. In those cases, the presumption is rebutted where the agent can demonstrate that he or she does not satisfy either the mental fault element or the contributory conduct aspect of the conduct element of the recommended scheme. However, the proposed scheme also provides for a defence in respect of the mental fault element for strict and absolute liability offences. There may be situations in which a defendant could not satisfy that he or she did not fail to prevent the substantive strict liability offending but could establish that he or she had acted reasonably. In such cases, the defence outlined in the previous section could apply, which would allow the defendant to prove that he or she had acted reasonably in exercising authority or control in relation to the corporate body's failure to satisfy any defence provided for in relation to the substantive offence. Although both a defence and rebuttable presumption are provided under the proposed scheme, there may be instances in which legislative provisions are unclear as to whether an offence is one of strict liability and, therefore, whether the defence or rebuttable presumption apply. A due diligence defence should therefore be provided for in legislation and it should stipulate the provisions to which it would apply to ensure sufficient opportunity for an accused to prove that all reasonable steps had been taken to prevent the contributory conduct.

**R 10.13** The Commission recommends that a due diligence defence should apply to the scheme of derivative managerial agent liability recommended in Chapter 9 insofar as it relates to strict liability offences.

## **E. Other Defences: Reliance on Legal/Official Advice, Duress and Delegated Duties**

### **1. Reliance on Professional Advice, Ignorance of the Law and Officially Induced Error**

#### **(a) Reliance on Professional Advice and Ignorance of the Law**

##### *(i) Reliance on professional advice and ignorance as to the law in Ireland*

10.253 In the context of relying on erroneous advice as to the state of the law, resulting in the commission of an offence, the principle that ignorance of the law is no defence (*ignorantia juris non excusat*) must be considered. In general, a mistake as to law, even if that mistake is based on professional legal advice, or official advice provided by the State, is not a

defence in criminal proceedings.<sup>359</sup> This is based on the long-established principle that “every person of discretion...is bound and presumed to know” the law.<sup>360</sup> There are strong policy arguments in favour of this position. To provide a defence of ignorance of the law may encourage such ignorance. It has been suggested that an ignorance defence would encourage people to shop around for professional legal advice until they find advice that suits them, regardless of the merits of the adviser.<sup>361</sup> It has also been argued that the effect of such a defence would be to “substitute the opinion of a person charged with a breach of the law for the law itself.”<sup>362</sup>

10.254 The harshness that might result from the rule is often tempered by the fact that, in general, criminal wrongs will be seen as moral wrongs<sup>363</sup> which require proof of intention or knowledge on the part of an accused, who must therefore know or be reckless as to their commission of the moral wrong. This factor will not always be present, however, in strict liability and absolute liability offences.<sup>364</sup> The question, therefore, arises as to whether an individual or corporate body who has committed a strict or absolute liability offence, but who reasonably sought and relied on erroneous legal advice in an attempt to ensure that the relevant offence was not committed, should be prohibited from relying on obtaining the advice as part of the “reasonable steps” which must be established for the purpose of raising a “due diligence” defence.

In *The People (DPP) v Whelan and McAteer*, the defendants (charged with being involved in an unlawful loan to purchase shares in a company contrary to section 60 of the *Companies Act 1963*) argued that they had obtained professional legal advice to the effect that the particular transaction was not unlawful, and had been advised by the Financial Regulator that it was comfortable with the legality of the transaction.<sup>365</sup> The defendants argued that this amounted to taking “reasonable steps” sufficient to rebut the presumption in section 383(2) of the *Companies Act 1963*<sup>366</sup> that the defendants had permitted the default by the company, in this instance the default being the provision of an unlawful loan.

<sup>359</sup> Though it may function as a defence in relation to civil wrongs: see *Coyle v Callanan* [2006] 1 IR 447.

<sup>360</sup> *Blackstone’s Commentaries on the Laws of England* (first published 1765-1769) volume 4, at 24.

<sup>361</sup> Charleton, Bolger & McDermott, *Criminal Law* (Bloomsbury 1999) at paragraph 18.23.

<sup>362</sup> Ormerord and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 157, (n. 313), quoting *Cooper v Simmons* (1862) 7 H & N 707, at 717.

<sup>363</sup> *Ibid* at 381.

<sup>364</sup> *Ibid*.

<sup>365</sup> *The People (DPP) v Whelan & McAteer*, Circuit Criminal Court, 10 April and 28 April 2014, *The Irish Times*, 11 April and 29 April 2014. In sentencing the defendants, the trial judge (Judge Nolan) held that it would be unjust to impose a custodial sentence as “a State agency had led them into error and illegality”.

<sup>366</sup> Section 383 of the 1963 Act has since been replaced by section 271(2) of the *Companies Act 2014*.

The prosecution argued that ignorance of the law is not a defence, and that what the accused believed regarding what was lawful was not relevant. It was further argued that the offence did not contain a requirement to prove the accused's knowledge as to the lawfulness of their actions. The prosecution argued that, were the court to accept an argument that the erroneous advice gave rise to something akin to a "due diligence" defence, this would have far reaching implications which would apply to the whole of the Companies Acts.<sup>367</sup>

The defendants argued that it would not be appropriate for the Court to find that the legal advice was irrelevant, as the possibility of being found guilty and sentenced to 5 years in prison, where there was no criminal intent, was contrary to the principles of justice. It was also argued that it was a fact that legal advice had been sought for the purpose of trying to minimise or prevent a breach of the 1963 Act.

The trial judge (Judge Nolan) held that it was a fundamental principle that ignorance of the law was not a defence. He also found that the mental element of the offence related to knowledge of facts, not of law. He held that "if I were to accept that there is such a thing as a good faith defence, I would be radically departing from the norms of Irish criminal law."<sup>368</sup>

10.255 Thus in the *Whelan and McAteer* case it was found that the relevant "officer in default" provision did not provide a statutory defence of due diligence.<sup>369</sup> Charleton, Bolger and McDermott<sup>370</sup> state that a mistake as to law, even if that mistake is based on professional advice, should not be a defence in criminal proceedings: "the law should not encourage people to shop around for advice until they find out which suits them, regardless of the merits of the advisor." The ruling in the *Whelan and McAteer* case and the analysis in Charleton et al may be compared with that applied in *Coyle v Callanan*,<sup>371</sup> which concerned an application to restrict two directors of a company under section 150 of the Companies Act 1990 (since replaced by section 819 of the Companies Act 2014). The grounds for the application included a loan that was given to one director, by the company, for the purpose of selling his 50 per cent share in the company. Both the company and the director receiving the loan obtained independent legal advice to the effect that the share

<sup>367</sup> Presumably, this was due to the suggestion that a "due diligence" defence be read into section 383 of the *Companies Act* 1963, as amended, which contains the provision attaching derivative liability to "officers in default".

<sup>368</sup> *The People (DPP) v Whelan & McAteer*, Circuit Criminal Court, 16 and 17 April 2014, *The Irish Times*, 17 and 18 April 2014.

<sup>369</sup> This is arguably also the case in the replicate provision in the *Companies Act* 2014.

<sup>370</sup> Charleton, Bolger and McDermott, *Criminal Law* (Bloomsbury 1999) at paragraph 18.23.

<sup>371</sup> [2006] 1 IR 447.

price was not contrary to section 60 of the 1963 Act. They were entitled to rely on that legal advice for the purposes of defeating the application to have them restricted, even though the Court also held that the advice was incorrect. It is notable that section 150 of the 1990 Act required the High Court to take into account whether a director acted honestly and responsibly and whether there is no other reason why it would be just and equitable to restrict the director: there is no similar provision in section 60 of the 1963 Act.

10.256 The general principle that ignorance of the law is no defence in criminal law has been “powerfully criticised”.<sup>372</sup> It has been argued that the prohibition of an ignorance of the law defence crystallised at a time when the contours of the criminal law were reasonably knowable.<sup>373</sup> However, it is arguable that this is no longer the case as the content of the criminal law is now subject to frequent change, and “whether particular conduct is subject to criminal sanctions at any particular time depends strongly on the social and political context.”<sup>374</sup> In addition, the remit of the criminal law has been expanded greatly in recent times, arguably beyond criminalising only conduct which is identifiable on its face as a “moral wrong”.<sup>375</sup> The presumption that everyone is deemed to have notice of the law, which forms the basis of the general rule, has been criticised as “outmoded and unrealistic given the volume and complexity of modern legislation”.<sup>376</sup> For example, the criminal law now contains significant numbers of offences aimed at supporting and enforcing the regulation of certain sectors.<sup>377</sup> Offences of this type can be technical in nature, potentially criminalising conduct that would only be identifiable as criminal with actual knowledge of the offence. It has been argued that an individual operating in a regulated sector, to which an offence of this nature applies, ought reasonably to have taken steps to familiarise themselves with the criminal law which applies to that sector,<sup>378</sup> but some of these

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<sup>372</sup> See Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 156; Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1.

<sup>373</sup> Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, at 3.

<sup>374</sup> See McIntyre, McMullan and Ó Toghda, *Criminal Law* (Roundhall 2012) at 1, giving the example of the decriminalisation of consensual sexual acts between adults of the same sex. This is an example of the criminal law altering in light of changing social norms.

<sup>375</sup> See McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 570: “the *ignorantia* maxim may have taken root in the common law at a time when the criminal law was more or less corresponded with contemporary morality – in other words, when it was virtually confined to offences which were *mala in se*”.

<sup>376</sup> McAuley and McCutcheon, *Criminal Liability* (Round Hall 2000) at 572.

<sup>377</sup> Connery and Hodnett, *Regulatory Law in Ireland*, (Tottel 2009) at 429, note that “It is a feature of regulatory law in Ireland that many breaches are criminal offences. One of the reasons for this is that Irish regulatory law is largely based on the implementation of EC Directives.”

<sup>378</sup> See Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, at 8. An example of this type of offence is section 34C(1) of the *Central Bank Act 1997* (as inserted by section 19 of the *Markets in Financial Instruments and Miscellaneous Provisions Act 2007*), which provides that it is an offence to operate as a retail credit firm or home reversion firm without having applied to the Central Bank of Ireland for authorisation. This offence is not of general application, as it applies only to persons operating within the retail credit or home reversion sector.



offences can also be very general in their application.<sup>379</sup> The prohibition of an ignorance defence has led to harsh outcomes in relation to offences in which the offending conduct is not easily identifiable as criminal, and which can apply to the public generally.<sup>380</sup> These arguments have been challenged in one of the submissions, which argues that the prohibition of an ignorance of the law defence applies to an even greater extent in the digital age era in which accessibility to information on legal obligations has been enhanced by modern technology. The submission also remarked that it is difficult to understand how a corporate body could be unaware of the laws by which they are bound.

10.257 The argument that an ignorance of the law defence would lead to the corruption of the legal profession, allowing individuals to “shop around” for a convenient legal opinion, has been criticised as “unduly cynical” and “questionable”.<sup>381</sup> It has been suggested that the policy arguments in favour of the prohibition of an ignorance of the law defence would not apply to a defence in which the ignorance or mistake is based upon “reasonable grounds”, as such a requirement would remove the risk of ignorance of the law being encouraged.<sup>382</sup> However, one of the submissions received questions the view that the strong internal regulation of the legal profession in Ireland prevents the risk that the law could encourage people to shop around for the advice that they want. The submission also noted the issue of legal professional privilege in the context of such a defence and suggested that shopping for multiple legal opinions, relying on the preferential opinion, and relying on privilege to exclude other opinions from any investigation remains a risk. It concluded that shopping around for a legal opinion which justifies errant behaviour, and relying upon privilege to not disclose unfavourable opinions is a risk.

10.258 The general rule that ignorance of the law is not a defence is not without exception in Ireland. The Oireachtas has provided a defence to a criminal offence that has not been brought to the notice of a defendant, in limited instances. Thus section 3(3)(b) of the *Statutory Instruments Act 1947* provides that a defendant shall have a defence to an offence provided by a statutory instrument where the prosecution does not prove that, at the date of the alleged contravention, notice of the making of the said statutory

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<sup>379</sup> Regulation 13(13) of the *European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (SI No.336 of 2011)* provides that it is an offence for a person to send an unsolicited marketing communication to an individual, who is not a customer, by SMS or e-mail or an unsolicited marketing communication to any individual by fax or automated calling machine unless prior consent of the individual has been obtained. This offence applies to any person, and so could be applied to a range of defendants such as companies with dedicated legal or compliance departments, who may be reasonably expected to have familiarised themselves with the rules regarding direct marketing, or could be applied to an individual sole trader without such resources.

<sup>380</sup> *Surrey County Council v Battersby* [1965] 2 QB 194 in which the defendant was erroneously advised by a state authority that she was not required to register a child-care arrangement as a fostering arrangement under the UK *Children Act 1968*. The defendant was convicted of an offence for this failure to register. Her ignorance of the legal requirement was held not to be a defence.

<sup>381</sup> O'Connor and Fairall *Criminal Defences* 3rd ed (Butterworths 1996) at 64; Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 910.

<sup>382</sup> See Ashworth, “Ignorance of the Criminal Law, and Duties to Avoid it” (2011) 74 MLR 1, at 6 and 24; O'Connor and Fairall *Criminal Defences* 3rd ed (Butterworths 1996) at 66.

instrument had been published in *Iris Oifigiúil*, or that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the effect of the statutory instrument to the notice of the public or of persons likely to be affected by it or of the defendant.

10.259 While ignorance of the law is generally not allowed to act as a defence, an issue which ought to be addressed is whether an individual or corporation, which relied upon legal advice in good faith and thought its conduct to be lawful, should be entitled to avail of a defence of ignorance as to the law or a claim of right made in good faith in its reliance on erroneous legal advice. There has been a degree of judicial commentary on the meaning of a claim of right made in good faith. In *The People (Attorney General) v Grey*,<sup>383</sup> the defendant was accused of taking certain company property contrary to section 20(1)(2) of the *Larceny Act 1916*. O’Byrne J in the Court of Criminal Appeal endorsed the statement that “[f]raud is inconsistent with a claim of right made in good faith to do the act complained of” and if an accused “honestly believes” they are entitled to take the relevant property, they are entitled to be acquitted even if this belief is unfounded in law or fact. This “honest belief” description of a claim of right made in good faith was also endorsed in *The People (DPP) v O’Loughlin*.<sup>384</sup> O’Higgins CJ in the Court of Criminal Appeal quoted with approval the following passage from *R v Bernhard*: “...a person has a claim of right, within the meaning of the section, if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.”<sup>385</sup> In neither *Grey* nor *O’Loughlin* is it expressly stated that an honest but unreasonable belief is sufficient but this is consistent with both and may be considered implicit in the generality of the reference to the honesty of the belief.<sup>386</sup> It has also been argued that the focus of belief in a claim of right, then, is not whether the claim in question is correct or the belief is reasonable but whether the claim in question is correct or the belief is reasonable but whether it is sincere.<sup>387</sup> As such, there appears to be at least some established areas of criminal law where relying on a belief of the lawfulness of conduct, perhaps based upon legal advices, will act as a defence.

(ii) *Reliance upon legal advice as a defence in other jurisdictions*

10.260 Reliance in good faith on erroneous legal advice has been found to be a good defence in other jurisdictions. In the United States case *Long v State*,<sup>388</sup> the Supreme Court of Delaware held that, before engaging in the alleged offending conduct, the defendant had “made a bona fide, diligent effort, adopting a course and resorting to resources and

<sup>383</sup> [1944] IR 326.

<sup>384</sup> [1979] IR 85.

<sup>385</sup> [1838] 2 KB 264.

<sup>386</sup> Law Reform Commission, *The Law Relating to Dishonesty* (LRC 43–1992) at 2.45.

<sup>387</sup> McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Round Hall 2011) at 20.

<sup>388</sup> (1949) 65 A 489.

means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliant upon the results of such effort”, he had a defence. Similarly, there has been recognition in other jurisdictions that, ignorance of the law can be a defence where a defendant had no, or no reasonable opportunity to become aware of the law in question.<sup>389</sup> The defences in these cases are that the ignorance or mistake of the defendant is sufficient to remove the existence of any mental culpability (*mens rea*) on the part of the defendant.

10.261 The UK *Enterprise Act 2002* provides a different formulation on a “seeking legal advice” defence in relation to cartel offences. A defendant will have a defence where he or she can demonstrate that “before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.”<sup>390</sup> The UK Competition and Marketing Authority (CMA), in its guidance note on cartel offence prosecutions, has noted that “[f]or the defence under section 188B(3) to succeed, an individual must show that the purpose for which he or she took steps to disclose the arrangements to a professional legal adviser was to obtain advice about them. The steps must also have been “reasonable”. The CMA takes the view that this must genuinely be an attempt to seek legal advice about the arrangement.”<sup>391</sup> At the time of writing (September 2018) there have been no reports regarding the application of this defence,<sup>392</sup> and so its operation in practice remains uncertain. However, unlike the “reliance in good faith” or “estoppels” defences considered in this section, this defence does not appear to require that a defendant has relied upon incorrect advice as to the state of the law, but rather only requires that the defendant has taken “reasonable steps” and made a genuine attempt to seek professional legal advice. In this way, this defence appears to be a form of due diligence defence, specifically aimed at ensuring that attempts are made to seek legal advice, rather than imposing a more general requirement that “all reasonable steps” are taken.

10.262 However, commentators have argued that the defence creates “a safe harbour for deliberate breaches of cartel laws”, as even if a defendant took the reasonable steps, but

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<sup>389</sup> The rule that ignorance or mistake of the law was no defence was overturned in South Africa in *S v De Blom* [1977] 3 SA 513 in which the defendant successfully defended a prosecution for contravening a regulation restricting the amount of jewellery which could be removed from the jurisdiction on the grounds that, due to her subjective ignorance of the regulation, the defendant was unaware that her actions were unlawful, and so she did not possess the requisite mental element for the crime. In *Lambert v California* 355 US 225 (1957) the US Supreme Court overturned a conviction of the defendant for failing to satisfy the obligation, as a felon, to register with the police, on the grounds that it was impossible for persons covered by the requirement to comply with it unless they knew about it, and there was no reason to assume this knowledge was widespread, or that the defendant was on notice of the requirement.

<sup>390</sup> Section 188B of the UK *Enterprise Act 2002*, as inserted by section 47 of the *Enterprise and Regulatory Reform Act 2013*.

<sup>391</sup> UK Competition and Marketing Authority, *Cartel Offence Prosecution Guidance* (2014), issued pursuant to section 190A of the *Enterprise Act 2002* (UK).

<sup>392</sup> This defence is only available in the prosecution of offences which occurred after 1 April 2014,

then deliberately ignored the legal advice and engaged in the wrongdoing, the defence would excuse criminal liability.<sup>393</sup> It has been argued that a purposive approach should be taken to interpreting the provision in order to avoid the outcomes, which arguably could not have been intended by Parliament. A suggestion is to achieve this by requiring the defendants to show that they intended to take reasonable steps to act on the legal advice obtained.<sup>394</sup> If the courts choose to take a literal approach to section 188B(3), it has been suggested that urgent legislative change is needed to prevent determined cartelists from using the mere obtaining of legal advice as a shield to criminal prosecution.<sup>395</sup> The defence would benefit those acting in good faith, who were provided with inaccurate legal advice or whose reasonable efforts to act on that advice failed. Furthermore, the issue of the provision of legal advice to an undertaking was addressed by the European Court of Justice ruling in *Schenker*<sup>396</sup> in which it was held that:

“legal advice provided to an undertaking cannot form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU nor will not give rise to the imposition of a fine.”<sup>397</sup>

10.263 Therefore, legislative change may also be advisable to render the cartel offence more consistent with European Union competition law.<sup>398</sup>

(iii) *Conclusion*

10.264 While the criminal law has evolved and become increasingly complex over time, access to law and information on legal obligations has been greatly enhanced by modern technology. Electronic codification and consolidation of legislation has increased accessibility significantly and lawyers offer highly specialised and tailored services to corporate clients with many corporations also having dedicated in-house legal teams. It should therefore be expected that corporations would have an understanding of the laws by which they are bound. The provision of a defence of ignorance of the law could also run the risk of being used to shop around for a favourable opinion that could be relied upon to the advantage of unscrupulous corporations. However, in situations in which an individual or corporation genuinely believed their conduct to be lawful in honestly acting in good faith on erroneous legal advice, it may be appropriate for a defence to be available in such circumstances. It would be for the courts to decide whether, based on the evidence, the defendant had acted honestly and in good faith. However, given that it may be difficult to establish whether or not a party had genuinely acted honestly and in good faith upon the

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<sup>393</sup> Stephan, “The UK cartel offence: a purposive interpretation?” (2014) Crim LR 12, at 880.

<sup>394</sup> *Ibid* at 880 and 892.

<sup>395</sup> *Ibid*.

<sup>396</sup> *Bundeswettbewerbshörde v Schenker & Co AG* (C-681/11) [2013] Bus LR 1176.

<sup>397</sup> *Ibid* at 41.

<sup>398</sup> Stephan, “The UK cartel offence: a purposive interpretation?” (2014) Crim LR 12, at 880-892.

erroneous legal advice and that the availability of such a defence may be open to considerable abuse, it is submitted that the apparent reliance in good faith upon erroneous legal advice should be considered as a mitigating factor at sentencing rather than as a full defence.

**R 10.14 The Commission recommends that it should remain the case that neither ignorance of the law nor reliance on legal advice should operate as a general defence in criminal law, but that this does not preclude such a defence being provided for in legislation on a case-by-case basis.**

**R 10.15 The Commission recommends that in circumstances in which there is evidence to indicate that an individual or corporate body acted in good faith and believed their conduct to be lawful in reliance on bona fide legal advice, such reliance on legal advice may be considered as a mitigating factor at sentencing.**

**(b) Officially induced error**

10.265 Officially induced error, where recognised, operates an exception to the maxim that ignorance of the law is no excuse. It arises in circumstances in which a defendant has relied in good faith on erroneous advice as to law, provided by a state emanation, and such reliance resulted in the defendant being prosecuted. Unlike the ignorance of the law defences considered above, this defence is not based upon the defendant's subjective ignorance of the law, which results in a removal of a defendant's mental culpability (*mens rea*), but rather is based upon the defendant's reliance on his or her constitutional right to due process.<sup>399</sup>

*(i) The doctrine of officially induced error*

10.266 The doctrine of officially induced error is recognised in several jurisdictions including Canada where it has developed from jurisprudence. The satisfying criteria for this doctrine were outlined in the Supreme Court of Canada decision in *R v Jorgensen*<sup>400</sup> by Lamer CJ (dissenting):

“In order for an accused to rely on an officially induced error as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions... The advice relied on by the

<sup>399</sup> Article 38.1 of the *Constitution of Ireland* contains similar fair procedures protection: “No person shall be tried on any criminal charge save in due course of law.” O’Malley, *The Criminal Process*, (Roundhall 2009) at 31; regarding entrapment generally states that “In the United States, it is treated as a substantive defence, but in most other common law jurisdictions it provides a grounds only for granting a stay. The justification for granting a stay on grounds of entrapment, as in courts in England, Canada and elsewhere have stressed, is not that the accused is innocent or that he might not get a fair trial, but rather that the courts cannot allow the integrity of the criminal process to be compromised.”

<sup>400</sup> [1995] 4 SCR 55.

accused must also have been erroneous, but this fact does not need to be demonstrated by the accused.”<sup>401</sup>

10.267 Advice must be sought before the committing of the act in question. Furthermore, it requires something other than a mere general quest for advice, but rather tailored to the accused’s particular situation. Lamer CJ clarified that under Canadian law a successful invocation of the defence will result in a stay on the proceedings. However, given the gravity of such a remedy, it could only be only available in “the clearest of cases”.<sup>402</sup>

10.268 *R v Jorgensen* also clarified to whom the determination of applicability of the doctrine fell:

“the question of whether officially induced error constitutes an excuse in law is a question of law or of mixed law and fact. While a jury may determine whether the accused is culpable, and hence whether this argument is necessary, it is for a judge to determine whether the precise conditions for this legal excuse are made out and if a stay should be entered...”<sup>403</sup>

10.269 The Supreme Court of Canada accepted and applied the above test in *Lévis (City) v Tétreault*,<sup>404</sup> *R v Pea*<sup>405</sup> and more recently, in *R v Bédard*.<sup>406</sup> In *Lévis (City) v Tétreault*, the Court applied Lamer CJ’s assessment of the constituent elements of the test and added that the advice itself and the reliance upon it must have been reasonable. LeBel J explained:

“Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion.”<sup>407</sup>

10.270 Most recently, the Canadian Supreme Court provided a clear definition of officially induced error in *R v Bédard*.<sup>408</sup> McLachlin CJ stated:

“The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and

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<sup>401</sup> *Ibid* at 28-35.

<sup>402</sup> *Ibid* at 37-38.

<sup>403</sup> *Ibid* at 37-38.

<sup>404</sup> [2006] 1 SCR 420.

<sup>405</sup> [2008] 93 OR (3d) 67 (ONCA).

<sup>406</sup> [2016] QCCA 807.

<sup>407</sup> [2006] 1 SCR 420, at 27.

<sup>408</sup> 2017 SCC 4, [2017] 1 SCR, at 1.

then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.”

(ii) *The doctrine of entrapment by estoppel*

10.271 A similar form of officially induced error known as “entrapment by estoppel”, which gives rise to an acquittal where established, has been recognised by the US courts. It is considered to fall under the broad federal doctrine of entrapment and therefore, if proven, constitutes grounds for an acquittal. The scope of the doctrine was set out in *United States v Weitzenhoff*<sup>409</sup> in which the Ninth Circuit of the Federal Court of Appeals held:

“Entrapment by estoppel applies when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official. *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir.1991). To invoke the entrapment by estoppel defense, the defendant must show that he relied on the official's statement and that his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir.1970).”<sup>410</sup>

10.272 In *United States v Pennsylvania Industrial Chemical Corp*,<sup>411</sup> the defendant received and relied on the advice of a regulator regarding the legality of discharging industrial pollutants into rivers. The US Supreme Court held that, as a result of the erroneous advice provided by the state, the defendant did not have fair warning as to the conduct which the government intended to make criminal, and so constitutional due process requirements prevented the prosecution from proceeding.<sup>412</sup> The US Supreme Court had also held in a further case that it would be a violation of due process to convict persons for engaging in conduct which they had been assured by an official to be legal.<sup>413</sup>

10.273 The American Law Institute’s *Model Penal Code* allows both an ignorance of the law defence, in certain circumstances,<sup>414</sup> and specifically a reliance on erroneous official advice

<sup>409</sup> [1993] 35 F.3d 1275.

<sup>410</sup> [1993] 35 F.3d 1275, at 1290.

<sup>411</sup> 411 US 655 (1973).

<sup>412</sup> *United States v Pennsylvania Industrial Chemical Corp* 411 US 655 at 647 (1973): “Thus, to the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.”

<sup>413</sup> *Raley v Ohio* 360 US 423 (1959); *Cox v Louisiana* 379 US 536 (1965).

<sup>414</sup> Article 2, section 2.04(1) of the American Law Institute’s *Model Penal Code* (1985): where the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or the law provides that the state of mind established by such ignorance or mistake constitutes a defence.

defence, in narrow circumstances.<sup>415</sup> The Model Penal Code grants a defence to a person who relies on “an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence.”<sup>416</sup> It is intended that the erroneous advice defence would “induce fair results without undue risk of spurious litigation”.<sup>417</sup>

(iii) *The doctrine of officially induced error in Ireland*

10.274 The defence has never been formally recognised in Ireland, although arguably, the justifications for doing so are at least as strong in this jurisdiction as they are elsewhere.<sup>418</sup> The Court of Appeal, in *The People (DPP) v Bowe and Casey*,<sup>419</sup> held that while a defence of officially induced error or entrapment would not be available on the facts at hand, such a defence is unavailable in this jurisdiction in any case. The appellants alleged that the trial judge had erred in law in determining that the defences of official-induced error and/or entrapment by estoppel due to the actions and/or defaults of the State authorities and, in particular, by the Financial Regulator, were not available to the appellant. The Court of Appeal analysed the Canadian doctrine of officially induced error and the US doctrine of entrapment by estoppel<sup>420</sup> and highlighted that the term “entrapment”, as it is correctly understood, does not relate to ignorance of the law regardless of the US courts referring to the defence of ignorance before the law as “entrapment by estoppel”.<sup>421</sup> The Courts outlined that if it were to consider the Canadian doctrine to exist in Irish law, the tests to be satisfied would be:

“(i) The accused must have considered the legal consequences of their actions and sought legal advice;

(ii) The legal advice must have been obtained from appropriate government officials who were involved in the administration of the law in question;

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<sup>415</sup> Article 2, section 2.04(3): where the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence.

<sup>416</sup> *Model Penal Code*, section 2.04(3)(b)(iv).

<sup>417</sup> Article 2, section 2.04 of the American Law Institute’s, *Model Penal Code* (1985).

<sup>418</sup> O’Malley, *Sentencing Law and Practice* 3<sup>rd</sup> ed (Roundhall 2016) at 19-12.

<sup>419</sup> [2017] IECA 250.

<sup>420</sup> *Ibid* at 37-44.

<sup>421</sup> *Ibid* at 44. Ryan P stated, “Entrapment does not involve ignorance of the law, but rather the luring of an actor into committing that which they know to be illegal. Officially induced error is distinct as it operates as a rare exception to the maxim that ignorance of the law is no excuse. It is immaterial that US courts have bizarrely referred to the defence as entrapment by estoppel.”



- (iii) The legal advice must have been erroneous;
- (iv) The legal advice must have been relied upon;
- (v) The reliance must have been objectively reasonable.”<sup>422</sup>

10.275 However, Ryan P held that in applying the facts to the present case, it was clear that the trial judge was not only entitled to find that the defence was not available but was obliged to do so, on the evidence.<sup>423</sup> In determining that a defence of officially induced error or entrapment by estoppel would not have been available to the appellants due to the absence of a relevant factual basis, Ryan P found that such a defence would have been unavailable regardless of the factual basis as the defence of officially induced error is not or not yet recognised in the law of this jurisdiction. He concluded:

“In summary, while entrapment is a recognised basis of defence in Irish law, it does not arise in this case. Official Induced Error in Canadian jurisprudence or Entrapment by Estoppel in the United States, while not or not yet recognised in our law are also not available to either of the appellants because the required factual basis is not present; the facts fall short. By way of footnote, the Court has considered the defences as if all submissions and arguments were available to each defendant without distinction.”<sup>424</sup>

10.276 The Court of Appeal stated that an accused who is seeking to rely on this principle to stop the prosecution going ahead must establish that he expressly, or by implication, sought information as to the legality of what he was doing and was provided with information, which would have entitled him to reach a conclusion that his conduct was legal, that was missing in the present case.<sup>425</sup> Notably, the Court clarified that even if it did apply, it is not actually considered to be a defence, but rather a basis for stopping or postponing a trial, perhaps indefinitely. It was stated that the purpose of a stay is to differentiate it from a directed finding of not guilty and that an alternative way would be prohibition of the prosecution which is what would happen in this jurisdiction. It appears that a prohibition of the prosecution would only occur where an accused sought information as to the legality of what they were doing and acted honestly on the information provided and that such a prohibition would not occur where there had been fraudulent intent or dishonesty. This appears to be the situation in this jurisdiction as the Court of Appeal went on to find that nothing the State authorities said or failed to say in this case could be relevant to the

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<sup>422</sup> *Ibid* at 52.

<sup>423</sup> *Ibid* at 53.

<sup>424</sup> [2017] IECA 250, at 55.

<sup>425</sup> *Ibid* at 50.

fraudulent intent and dishonesty ingredients required for the offence charged.<sup>426</sup> Ryan P stated:

“Irrespective of whether or not the Financial Regulator was aware of, and in fact even if he had condoned what was done, that was irrelevant. It would not provide the accused with a defence and would not have rendered legal that which was illegal. While it may go towards mitigation, it cannot serve to eliminate criminal culpability. The Court is satisfied that the trial judge was correct in his charge to the jury on the mens rea for the common law offence of conspiracy to defraud. It is important to draw the distinction between an allegedly benevolent overall purpose and the particular intention for the commission of a crime.”<sup>427</sup>

10.277 The Court also noted that the circumstances in which the offences took place may provide reasons for mitigation of penalty but not for escaping conviction.<sup>428</sup> This appears to be the approach applied by the Circuit Court in *The People (DPP) v Whelan & McAteer*<sup>429</sup> as in sentencing the defendants, the trial judge (Judge Nolan) held that it would be unjust to impose a custodial sentence as “a State agency had led them into error and illegality”.<sup>430</sup> The case law, therefore, appears to suggest that while officially induced error is “not or not yet” recognised in this jurisdiction, it may be considered as a mitigating factor during the sentencing stage.

10.278 However, it is important to note that in 2018 the second defendant in *The People (DPP) v Bowe and Casey*<sup>431</sup> successfully applied for leave to appeal to the Supreme Court regarding the availability of a defence of officially induced error.<sup>432</sup> The applicant has submitted that the Court of Appeal erred in its formulation of the applicable test for a defence of “officially induced error”, in that it should not have inserted the requirement that the accused should have obtained legal advice. The contention is that the Court of Appeal has introduced ambiguity as to the circumstances in which the defence is available.<sup>433</sup> The DPP disputes many of the statements of fact made by the applicant including the assertions that the Financial Regulator or the Central Bank knew of, encouraged or approved the transactions, contending that this was not established in evidence. The DPP emphasised the finding that these defences were not open to the applicant on the evidence.<sup>434</sup>

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<sup>426</sup> *Ibid* at 59.

<sup>427</sup> *Ibid* at 60.

<sup>428</sup> *Ibid* at 61.

<sup>429</sup> Circuit Criminal Court, 10 April and 28 April 2014.

<sup>430</sup> The Irish Times, 11 April and 29 April 2014.

<sup>431</sup> [2017] IECA 250.

<sup>432</sup> *The People (DPP) v Casey* [2018] IESCD 87.

<sup>433</sup> *Ibid* at 29.

<sup>434</sup> *Ibid* at 30.

However, the Supreme Court granted leave to appeal on the question of whether the defence of “officially induced error” is available in this jurisdiction and, if so, what its parameters are and whether it was open to the applicant on the evidence in this case.<sup>435</sup> At the time of writing (September 2018), the appeal to the Supreme Court has not been heard or decided and, accordingly the general availability of a defence of officially induced error in this jurisdiction remains to be definitively decided.

10.279 A legislative example of a specific form of officially induced error type defence is provided by the *Competition Act 2002*. Sections 6(5) and 7(2) of the 2002 Act provide for a defence where an offence is committed on foot of a determination made or a direction given by a statutory body. Section 14(9) of the Act also provides for a defence in an action for damages where an offence is committed on foot of a determination made or a direction given by a statutory body. It is therefore clear that the legislature accepts that the availability of an officially induced error type defence is justifiable, at least in certain circumstances, in this jurisdiction.

(iv) *Conclusion*

10.280 Several arguments exist in favour of the introduction of the doctrine of officially induced error in this jurisdiction. It may be difficult to justify punishing an individual or entity where legal advice has been specifically sought from a public body and relied on honestly without any criminal intention. As Lamer CJ stated in *R v Jorgensen*:<sup>436</sup>

“From this perspective of moral blameworthiness, it is difficult to justify convicting an individual who has considered that her behaviour may be illegal, consulted an appropriate authority regarding the legality of her actions, and relied on the advice that she obtained in a way that appears objectively reasonable.”<sup>437</sup>

10.281 While recognising the view of the Court of Appeal in *The People (DPP) v Bowe and Casey*,<sup>438</sup> the Commission recognises that there are situations in which it may not be appropriate or possible for officially induced error to result in a prohibition of a prosecution during a preliminary trial hearing, due to the need for a trial to progress before establishing whether the case had been impacted by official induced error. In such situations, the Commission recommends that it would be appropriate to allow officially induced error to be raised during the course of the trial. Such an instance may be accommodated under Head 2(11) of the *Revised General Scheme of the Criminal*

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<sup>435</sup> *Ibid* at 31.

<sup>436</sup> [1995] 4 SCR 55.

<sup>437</sup> *Ibid* at 8.

<sup>438</sup> [2017] IECA 250.

*Procedure Bill*<sup>439</sup> which provides that the Circuit Court, the Central Criminal Court or a Special Criminal Court, may during the course of a trial make any order listed in Head 2(4)(a) to (f) whether or not such an order is within the inherent jurisdiction of the court. Therefore, in order to facilitate the recognition of officially induced error during the course of a trial, where it did not result in a prohibition of the prosecution during a preliminary hearing, the trial court may make an order in the form provided for in Head 2(4) of the *Revised General Scheme of the Criminal Procedure Bill* where the defendant raises officially induced error during the course of the trial.

10.282 There is certainly a strong argument for formally recognising officially induced error as a factor resulting in a prohibition of a prosecution or as a defence.<sup>440</sup> A person who was sufficiently conscientious to seek appropriate advice, and who then acted upon it in good faith, is hardly as blameworthy as one who acted without demonstrating any concern about the legality of the relevant conduct.<sup>441</sup> The case for recognising such a defence is strengthened when it is considered against the increasingly complex legal framework including growing numbers of regulatory offences. It may be difficult to satisfy the constitutional right to personal liberty unless individuals and corporations can have certainty as to “how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs.”<sup>442</sup> For these reasons, the Commission recommends that in certain cases, individuals and corporations should be able to rely on official advice, which appears authoritative and reasonable, and which they have sought in good faith to apply within the law.<sup>443</sup>

**R 10.16 The Commission recommends that where an instance of officially induced error, including such an error resulting from advice from a regulator, does not prevent the initiation of a criminal prosecution, it should be open to the defendant to raise the instance of officially induced error during the trial, where the advice appears authoritative and reasonable, and where the individuals and corporations have sought in good faith to apply it within the law.**

**R 10.17 In order to facilitate the recognition of officially induced error during the course of a trial, where it did not result in a prohibition of the prosecution during a preliminary hearing, the Commission recommends that the trial court may make an order in the**

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<sup>439</sup> *Revised General Scheme of the Criminal Procedure Bill* (June 2015), available at <http://www.justice.ie/en/JELR/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf/Files/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf>. The Government Legislative Programme for Autumn Session 2018 (September 2018) includes publication of the Criminal Procedure Bill as a Priority Bill.

<sup>440</sup> O'Malley, *Sentencing Law and Practice* 3<sup>rd</sup> ed (Roundhall 2016) at 19-12.

<sup>441</sup> *Ibid.*

<sup>442</sup> Waldron, “The concept and the rule of law” (2008) 43 *Georgia LR* 1, at 6.

<sup>443</sup> O'Malley, *Sentencing Law and Practice* 3<sup>rd</sup> ed (Roundhall 2016) at 19-12.

**form provided for in Head 2(4) of the Revised General Scheme of the Criminal Procedure Bill where the defendant raises officially induced error during the course of the trial.**

## **2. Duress and “Superior Orders”**

10.283 The defence of duress is a recognised defence in criminal law, but is quite narrow in scope and can only apply where a “do it, or else” threat is made, where the threat is imminently related to the offence in question and where the threat is so great that it overbears the ordinary powers of a person.<sup>444</sup>

10.284 In *Cavan County Council v Shannon Regional Fisheries Board*,<sup>445</sup> the defendant had argued that even though it had taken all the precautions it could within its available resources, it was restricted in what it could do because the Department of the Environment, its parent Department, did not provide it with sufficient resources to do more. It was therefore argued that, as the Council had no alternative other than to perform the offending conduct (due to its statutory obligations), it was acting in effect under duress, and that this provided a defence to the charge under the Fisheries (Consolidation) Act 1959. The majority in the Supreme Court held that the provision in question did not provide for a defence of duress.

10.285 It does not seem that a variation of this argument, in which an individual argues that he or she was not a director, manager or similar officer but was required to carry out the offending conduct on the orders of a person in a superior management position, would be successful. In *The People (DPP) v Maguire*,<sup>446</sup> the Court of Appeal accepted that an assistant manager with Anglo Irish Bank was delivering messages from senior management in providing instructions to IT professionals regarding the deletion of certain accounts so that they would not be included on a list that was supplied to the Office of the Revenue Commissioners. Birmingham J stated:

“The evidence is that it was Ms. Maguire who told the IT professionals what they were to do. It was accepted that she was doing this on her own initiative, indeed her status in the bank was such that she would not have had authority acting on her own to issue instructions to the IT department, but rather that she was

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<sup>444</sup> Law Reform Commission, *Defences in Criminal Law* (LRC 95-2009), see Chapter 5. In *Attorney General v Whelan* [1934] IR 518, the Irish authority on duress, it was stated (at 526), “[T]hreats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal.” The Court noted that the application of the general rule was subject to certain limitations. Before the defence is successful, it must be shown that the will of the defendant must have been overborne by the threats; the duress must be operating when the defence is committed and if there is an opportunity for the individual to escape the threat and the opportunity is not taken, the plea of duress will fail. In *Whelan*, the Court held that the appellant’s conviction should not stand and directed a verdict of acquittal.

<sup>445</sup> [1996] 3 IR 267.

<sup>446</sup> [2015] IECA 350.

passing on the messages and instructions of persons senior to her, as it was put at trial, delivering “messages from upstairs”.<sup>447</sup>

10.286 It was also noted that the sentencing court had taken the view that the defendant’s role was that of a conduit.<sup>448</sup> Judge Nolan, in a related case before the Circuit Criminal Court, also said that evidence given by witnesses during the trial demonstrated that Ms Maguire was a mere conduit for more powerful voices. He stated, “[s]he was being directed. Of that there is no doubt,”<sup>449</sup> However, acting under instructions from senior management was not permitted as a defence and Maguire was subsequently convicted. One of the submissions received argues that a statutory duress or “superior orders” defence should not be available to a subordinate corporate officer or employee as it would present the following risks:

- (1) it may exaggerate the paradox of size, making it more difficult to prosecute individuals in large/complex corporate structures;
- (2) it may encourage structures which distance management from criminal acts;
- (3) it may divest lower ranking officers of responsibility for their actions, harming good corporate culture;
- (4) it may undermine whistleblowing procedures.

10.287 In summary, the defence of duress is a recognised defence in criminal law, but is quite narrow in scope. As it can only apply where a “do it, or else” threat is made and where the threat is so great that it overbears the ordinary powers of a person, it would appear difficult to argue that a corporation could avail of such a defence. It was argued in the submissions received that a company could not be subject to duress. However, a defence of duress would be available to individual offenders for corporate liability offences. With regard to the availability of a “superior orders” defence, unless the nature of “superior orders” include a “do it, or else” threat of immediate harm, the law will not recognise that a subordinate employee has a defence; though such an argument may be made by way of a plea in mitigation at the sentencing stage.

**R 10.18 The Commission recommends that the defence of duress or “superior orders” should be available only where a threat of death or serious immediate harm is directed towards any person.**

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<sup>447</sup> *Ibid* at 10.

<sup>448</sup> *Ibid* at 14.

<sup>449</sup> Irish Independent, 31 October 2017 and 1 November 2017.

### 3. Delegation of due diligence function and reliance on professional advice

- 10.288 In considering a due diligence defence, particularly in the context of corporate offences, an important consideration is how to apply such a defence in circumstances in which holders of particular offices, or named individuals, are given the task of ensuring compliance with designated matters as part of the normal course of delegation in an organisation. Legislation has provided for defences that a competent and reliable person was made responsible for ensuring that certain statutory requirements are satisfied.<sup>450</sup> Section 54 of the *Investment Intermediaries Act 1995* provides that it shall be a defence to prove that the defendant had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and was in a position to discharge that duty.
- 10.289 The concept of delegating performance of a due diligence requirement has been frequently assessed in relation to the duty of directors to exercise due care skill and diligence in carrying out their functions as directors. This duty has been placed on a statutory footing by the *Companies Act 2014*,<sup>451</sup> but its origins flow, in part, from a director's fiduciary duties in equity and, in part, from the duty of care in negligence.<sup>452</sup>
- 10.290 It has been acknowledged that, particularly in larger corporate bodies, a director must be allowed to delegate some function over which, he or she has a duty to exercise due diligence, for obvious practical reasons.<sup>453</sup> However, though a director will often delegate the function of performing due diligence requirements, the statutory duty remains with the director. While the function may be delegated, the responsibility for exercising due

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<sup>450</sup> See for example, the *Investment Intermediaries Act 1995*; section 54 of the *Stock Exchange Act 1995*; and sections 65 and 79 of the *Investor Compensation Act 1998*.

<sup>451</sup> Section 228 of the *Companies Act 2014*.

<sup>452</sup> Ahern, *Director's Duties* (Roundhall 2009,) at 104, outlines the development of this duty, from both equitable and common law principles.

<sup>453</sup> In *Kavanagh v Cook and Byrne* [2005] IEHC 225, which related to an application for restriction of a director, the High Court (MacMenamin J) noted that "issues such as delegation which may have a significant bearing in the defence of the activities of directors in larger enterprises can hardly be seen in the same light in this small company where the managing director either knew, must have known, or ought to have known, any relevant matter regarding the conduct of the company's affairs."

diligence may not.<sup>454</sup> There is an important distinction between delegated authority and delegated responsibility.

10.291 Similarly, in certain circumstances, a director will be required to engage professional advisers in order to deal appropriately with matters with which a director cannot have the expertise to deal.<sup>455</sup> Although reliance on professional advice can form part of the reasonable steps that a director must take to satisfy this duty, it is also the case that the director may not divest himself or herself of the obligations of a director.<sup>456</sup> This results in a prohibition on a director simply doing as advised. This is reflected in the fact that fulfilling the duty to exercise due care, skill, and diligence includes a continuing duty to acquire and maintain a sufficient knowledge and understanding of a company's business to enable directors properly to discharge their duties.<sup>457</sup>

10.292 Therefore, delegation of a due diligence function and reliance upon advice, when done reasonably, can be compatible with meeting the fiduciary duties and the duty of care of a director, and can therefore form part of the "reasonable steps" which an individual or corporation took in exercising due diligence for the purpose of a "due diligence" defence. The question of whose due diligence is relevant arguably depends on who is charged with an offence.<sup>458</sup> A duty is non-delegable for the purposes of due diligence;<sup>459</sup> in other words a company cannot invoke the defence if it has delegated its responsibilities to another who

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<sup>454</sup> The Basel Committee on Banking Supervision, *Guidelines: Corporate Governance principles for banks*, (Bank for International Settlements 2015) at 8, states that it is a recognised principle that "[t]he board has ultimate responsibility for the bank's business strategy and financial soundness, key personnel decisions, internal organisation and governance structure and practices, and risk management and compliance obligations. The board may delegate some of its functions, though not its responsibilities, to board committees where appropriate" A statutory example of this ultimate responsibility is the obligation under the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*. Thus, the *Central Bank's Report on Anti-Money Laundering/Countering the Financing of Terrorism and Financial Sections Compliance in the Irish Banking Sector* (Central Bank of Ireland 2015) at 30, states: "While the Board may delegate its AML/CFT responsibilities to Senior Management, the Board is ultimately responsible for ensuring compliance with the CJA 2010 and must put in place appropriate AML/CFT structures that reflect the nature and complexities of the bank's activities."

<sup>455</sup> *Coyle v Callanan* [2006] 1 IR 447. This case concerned an application to restrict two directors of a company pursuant to *Section 150* of the *Companies Act 1990*. In refusing to restrict the directors, the High Court (O'Leary J) found that as the respondents received legal advice, they were entitled to rely on that legal advice notwithstanding that the advice was incorrect.

<sup>456</sup> In *Official Receiver v Ireland* [2002] BCC 428, it was noted that a director who had approved the removal of assets from the company for no consideration could not take refuge in the fact that he had obtained legal advice sanctioning the transaction. It was held that the director was entitled to rely on legal advice, but not to the extent that he could abdicate all responsibility as a director by seeking to hide behind professional advisers.

<sup>457</sup> *Re Barings Plc; Secretary of State for Trade and Industry v Baker & Ors (No.5)* [1999] 1 BCLC 433, *Re Vehicle Imports Ltd*, High Court (Murphy J), 23 November 2000.

<sup>458</sup> The Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010), at paragraph 6.21.

<sup>459</sup> *R v Mersey Docks and Harbour Company* (1995) 16 Cr App R (S) 806.



does not act with due diligence. Accordingly, the failure of the delegate is the failure of the principal.<sup>460</sup>

**R 10.19 The Commission recommends that while a managerial agent may delegate the function of exercising due diligence, the legal responsibility for exercising due diligence may not be delegated as this remains with the managerial agent.**

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<sup>460</sup> The Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts* (No 195 2010) at paragraph 6.63.

## CHAPTER 11

# EXISTING FRAUD OFFENCES: THE FAULT ELEMENT AND RECKLESSNESS

### A. Introduction

11.01 This chapter considers the adequacy of certain Irish fraud offences. In particular, it analyses whether the fault or mental element in the most significant Irish fraud offences should be extended to include recklessness. For the purposes of this chapter, “fraud offences” refers to offences under sections 6, 7, 9, 10 and 11 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*. As will be seen, the conduct elements of these offences are quite broad, and so if there is a limiting factor that restricts their application to a broader variety of cases, it is their fault elements. The chapter also discusses whether the important common law offence of conspiracy to defraud is sufficiently broad in scope to cover the type of fraudulent behaviour included in the US offences of mail and wire fraud.

11.02 As to the fraud offences in the 2001 Act, the chapter primarily addresses two specific questions in considering the adequacy of:

- (1) Do these existing offences currently cover reckless behaviour, or could they be interpreted to cover such behaviour?
- (2) If the answer to (1) is negative – ought fraud offences be reformed to criminalise reckless behaviour?

11.03 One of the principal difficulties in analysing these offences is that there are few reported judgments that address their interpretation.<sup>1</sup> Reported judgments of the Superior Courts that consider these interpretative points are often extradition cases addressing correspondence issues between Irish offences and analogous offences in other jurisdictions.<sup>2</sup> For the most part, therefore, the analysis below is derived from academic

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<sup>1</sup> The term “mislead” was briefly considered by the High Court (Peart J) in *Minister for Justice, Equality and Law Reform v Tomella* [2008] IEHC 443 (while this was notionally in the context of section 6 of the 2001 Act, that section does not itself use the term “mislead”).

<sup>2</sup> Some of the more instructive of these for present purposes include: *Attorney General v Lee* [2015] IEHC 340, paragraphs 10.2 to 10.8; *Minister for Justice and Equality v EP* [2015] IEHC 662 at paragraphs 39 to 42; *Minister for Justice, Equality and Law Reform v Marciszewski* [2011] IEHC 12; *Minister for Justice, Equality and Law Reform v Laks* [2009] IEHC 3.

commentary and contextual analysis of the 2001 Act's fraud offences and predecessor fraud offences, as well as reforms to fraud offences in other jurisdictions.

11.04 The chapter begins with a description of the ambit of the offences considered. This is done following the template of 'elemental analysis'; that is, an analysis which breaks the offence down into several constituent objective elements to which fault elements must (individually) correspond.<sup>3</sup> The definition of recklessness as considered by the Irish courts is then explored. Finally, arguments supporting the extension of these offences through the inclusion of a provision on recklessness are considered.

## B. Existing Fraud Offences

11.05 This section analyses the conduct and fault elements of several fraud offences in Ireland under the 2001 Act. Many of the offences considered are drafted in a similar manner and share certain core elements. Thus, if the fault element of one of these offences was broadened the others should, at least *prima facie*, be broadened as well.

11.06 As set out in the introduction above, the offences considered in this chapter are analysed elementally; that is, offences are broken down into distinct, individually analysable parts. Fault elements then attach to each objective element, where possible. This entails that different fault elements may attach to different objective elements. The sum of these elements is what the prosecution must prove successfully to secure a conviction. The advantage of this analysis is that it puts more defined shape on an otherwise nebulous inquiry for the prosecution to prove that the accused performed a prohibited act, and that they did so with a particular mental state. It clarifies that the accused may have to perform a multitude of acts, and different mental states (or no mental state at all) may attach to these individually.

11.07 A serious criminal offence typically has two essential elements. These are (1) the conduct, or 'objective' element, and (2) the mental or 'fault' element. These elements can, in turn, be subdivided into different types:<sup>4</sup>

### Objective elements

*Conduct*: an act, omission or state of affairs.<sup>5</sup>

<sup>3</sup> The terms "objective element" and "fault element" correspond with the traditional terms *actus reus* and *mens rea*, which in turn derive from the Latin phrase *actus non facit reum, nisi mens sit rea* – an act does not render an individual guilty unless their mind is guilty.

<sup>4</sup> The understanding here is drawn, with slight modification, from the Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (May 2010).

<sup>5</sup> In the Criminal Codification Advisory Committee's scheme, the conduct element does not form part of the definition of an offence and so does not need to be proved. This is because conduct is taken as describing physical movements and actions (such as squeezing a trigger). These will incidentally be proved by establishing that the circumstance element (killing or injuring someone by shooting them) occurred.

*Circumstance*: a qualitative characteristic of the conduct or result element(s).

*Result*: a consequence brought about by the conduct element.

Fault elements<sup>6</sup>

*Intention*: having it as one's conscious aim, object or purpose that a result will obtain; acting with the purpose of bringing about the result or circumstance.<sup>7</sup>

*Knowledge*: awareness of a circumstance or that a result will obtain.

*Recklessness*: conscious and unjustifiable disregard of a substantial risk that a circumstance exists or will exist, or that a course of action will cause a particular result.

11.08 Horder has classified fault elements along similar lines:

“The term ‘*mens rea*’ has conventionally been used to connote the following fault requirements: intention or recklessness as to a specified consequence; and knowledge of, or recklessness as to, a specified circumstance.”<sup>8</sup>

11.09 This classification joins intention to consequences, and knowledge to circumstances.

Recklessness can then apply to either consequences or circumstances; one can be reckless as to whether a consequence materialises or as to whether a circumstance exists. This highlights an important difference between the fault elements of intention and knowledge. Intention suggests something volitional about the action that is undertaken; it suggests that the action is part of a wider scheme, and that the accused holds a particular attitude towards the result. Knowledge is not volitional in this way. Conscious awareness of a set of circumstances does not require the accused to adopt any particular attitude regarding the desirability of those circumstances. The difference between intention and knowledge, on this view, is therefore a question of volition. Results are classified as acceptable or unacceptable to wish for or desire. If a result is acceptable to desire, it will not be criminal. If a result is unacceptable to desire, and is therefore criminal, then we can

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The circumstance element(s) of the crime are part of the formal definition of the crime and are, therefore, part of the required proofs to make the crime out.

<sup>6</sup> The fault elements described are all to be interpreted subjectively where both an objective and subjective interpretation are available. Negligence could also have been included among the fault elements but given its low level of blameworthiness, and its inappropriateness to serious offences such as fraud, it is not considered here.

<sup>7</sup> McIntyre et al, *Criminal Law* (Round Hall 2012) at 52, quoting the Law Commission of England and Wales, *Legislating the Criminal Code: Offences Against the Person and General Principles* (No. 218,1993) at paragraph 7.5.

<sup>8</sup> Horder, *Ashworth's Principles of Criminal Law* 8th ed (OUP 2016), at 188.

further say that, *where you are aware of that result*, if you want that result to obtain then you intend it, and if you do not want that result to obtain, but you act anyway, then you are reckless.

11.10 Attitudes, then, do not matter to circumstances, but these become difficult to classify sensibly where recklessness requires advertence, as it does in Ireland. Given that circumstances are not assessed based on volition, we cannot distinguish between a person *wanting* a circumstance to occur and not wanting that circumstance to occur. Instead, the distinction between knowledge and recklessness is a *probabilistic* one. It refers to the degrees of certainty in the mind of the actor with regard to the likeliness of the circumstances obtaining, presumably where these circumstances are things not directly within their control.

## 1. Making a gain or causing a loss by deception (section 6 of 2001 Act)

11.11 The offence in section 6 of the 2001 Act reads as follows:

“A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence.”

11.12 The breadth of this offence is illustrated by the facts of *Kelly and Buckley v Ryan*.<sup>9</sup> Here the applicants were officials of Irish Bank Resolution Corporation (IBRC). In this capacity, they had dealings with the notice party, Mr Halpin, who was a director and shareholder of two companies that owed significant sums to IBRC. A meeting was convened between these parties, the purpose of which Mr Halpin believed to be the working out of an agreement whereby the companies could continue to trade. Allegedly, however, at the time of the meeting, the applicants were already aware of a decision to appoint a receiver to both companies and they failed to inform Mr Halpin of this decision. Mr Halpin claimed that this failure constituted a criminal offence under section 6 of the 2001 Act.

11.13 It is not immediately apparent what the ‘loss’ to Mr Halpin was on these facts. Supposedly, it was the failure of the applicants to inform him of the plan to appoint a receiver (which would additionally have to constitute a dishonest deception). This led him to retain an accountant and attend the meeting, at cost, in the belief that there was some way of salvaging the companies. This would have to constitute loss to Mr Halpin and, moreover, a loss that was induced by the silence of the applicants. The High Court (Hogan J) noted these difficulties but was still prepared to allow judicial review of the decision of the respondent judge of the District Court.<sup>10</sup> The Supreme Court ultimately concluded that either or both of the elements of deception and inducement were not made out on these

<sup>9</sup> [2013] IEHC 321, [2015] IESC 69.

<sup>10</sup> [2013] IEHC 321, at paragraphs 27 and 28.

facts.<sup>11</sup> The Supreme Court thus quashed the decision of the judge of the District Court to issue a summons on the basis that there was no evidence or material before her to justify a sustainable conclusion that each essential element of the alleged offence was present. Notwithstanding this finding, the case stands as a testament to the wide nature of section 6; that it was even arguable that these facts might constitute an offence under that section demonstrates its breadth.

11.14 The remainder of this section will set out an analysis of section 6, much of which can be transplanted to the context of other 2001 Act offences. In particular, the element of ‘deception’ is shared by both sections 6 and 7. The elements of ‘making a gain or causing a loss’ and ‘dishonesty’ are shared by all the offences considered here. The discussion in those elements in the context of section 6 is thus of particularly general application.

**(a) Elements of the Offence**

11.15 The elements of the offence in section 6 are set out in the following table:<sup>12</sup>

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<sup>11</sup> [2015] IESC 69, at paragraphs 8.1 to 8.5.

<sup>12</sup> This is an adaptation of Head 4012 of the *Draft Criminal Code Bill* published by the Criminal Law Codification Advisory Committee in 2010, available at [www.criminalcode.ie](http://www.criminalcode.ie). One major change in that code is the removal of dishonesty and its replacement by a defence of acting with a claim of right made in good faith. This excludes dishonesty from the Code’s definition of the offence in section 6. The definition set out in the table does, however, substantially mirror that of Clarke J in the Supreme Court in *Kelly v Ryan* [2015] IESC 69, at paragraph 8.1: “In order to be guilty under [the offence in section 6 of the 2001 Act] a person must (a) dishonestly, (b) with the intention of making a gain for himself/herself or another... or causing loss to another, (c) by deception and (d) induce another to do or refrain from doing an act.”

	Conduct	Circumstance	Circumstance	Result	Ultior Intention
<b>Objective Elements</b>	Any Act	Accused engages in a deceptive act	Without a claim of right	Complainant relies on deceptive act	n/a
<b>Fault Elements</b>	n/a	Intention <sup>13</sup>	Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.1. The Offence in Section 6

11.16 As the offence does not have clear textual fault elements, outside of the ulterior intention element, the other fault elements have been interpolated.<sup>14</sup> The conduct element of the offence in section 6 can be any act; it could be verbal or written communication or even gestures. There are two circumstance elements: (i) a deceptive act, and (ii) operating without a claim of right. The second circumstance element derives from the definition of 'dishonesty' in the Act.<sup>15</sup> Good faith cannot be parsed as a fault element itself, but it may be taken as roughly analogous to the fault element of knowledge. To make out good faith it would be necessary, at a minimum, to establish that the accused knew, or thought they knew, *something* about their title in support of a claim of right. It would be difficult to act in good faith without knowing anything at all; if good faith is acting to the best of your knowledge, it is tautological that it requires knowledge. Operating without a claim of good faith, as it is an omission, is still difficult to parse on this understanding, as good faith requires more than just knowledge. Knowledge is just one of several necessary ingredients for a good faith claim.<sup>16</sup> Operating without a claim of good faith clearly excludes good

<sup>13</sup> For an argument supporting the use of intention here, see below the discussion on deception. The specific definition of that term in section 2(2) of the 2001 Act makes it clear that the accused must know that the information being relied upon by the complainant is false. In a sense, therefore, the fault element of this part of the offence could be further subdivided into two parts: knowledge of the deceptive character of the act, and intentionally acting. Since intention can be taken to impute knowledge, this nuance is not presented in the table above. It is, however, relevant when considering whether fault elements less than intention can suffice for culpability under the 2001 Act's fraud offences. The definition of deception, which figures in some of those offences, is another factor militating against such an interpretation.

<sup>14</sup> See below the discussion on the presumption of *mens rea* for a more detailed argument on how fault elements may be interpreted where they are not textually supplied. As argued below, it is likely that the only fault elements that can reasonably be read into this offence, and the other fraud offences considered, is intention (or knowledge, where intention is not semantically applicable).

<sup>15</sup> Section 2(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>16</sup> Like intention, discussed above in the general discussion of fault elements at the beginning of this chapter, good faith seems to require something volitional or attitudinal. Good faith is a combination of acting with the right sort of knowledge (or beliefs held reasonably in the circumstances) combined with a particular positive or laudable attitude towards the actions taken.

faith, but it does not necessarily go so far as to require what would be classified as bad faith. Because of difficulties such as these, perfect correspondence with an established criminal law fault element is not possible but it seems that the good faith element of the fraud offences attaches most appropriately to the fault element of knowledge.

11.17 It might be objected that good faith is coterminous with belief, as distinct from knowledge. Older judicial authorities considering this phrase (analysed below under the heading ‘Dishonesty’) have considered that it is tantamount to ‘honest belief’.<sup>17</sup> Beliefs are attitudinal; they are a disposition that an individual has to a particular statement or proposition (regarding it as true or false). Qualifiers such as ‘good faith’, ‘reasonable’ or ‘honest’ in this context place additional constraints on the belief-holder; they require some justification of the belief as being acceptable, or at least rational, by an external party. It is arguable that these are knowledge-based constraints (constructive knowledge or otherwise). Knowledge builds on belief as an attitudinal mental state by supplementing it with additional facts about the outside world. For a belief to qualify as ‘knowledge’ it requires additional data to support the truth or falsity of the proposition that is believed. As mentioned in the preceding paragraph, it is important to recall that in the context of the dishonesty offences under the 2001 Act that it is an *absence* of good faith that is criminalised. Elements negating good faith beliefs, or honest/reasonable ones, will often be things that an accused either positively knew or ought to have known because they were so obvious. In effect, therefore, considering that the good faith criterion in the 2001 Act is negative, and that many qualifiers for belief states in criminal law will be knowledge-based, the fault element for the ‘dishonesty’ aspect of the 2001 Act’s offences is taken to be knowledge. The relevant conduct element is acting without a claim of right.<sup>18</sup>

11.18 One final alternative is that it could be argued that dishonesty is present in the offence as a second ulterior intention. This seems unlikely, however. Ulterior intentions are those that the accused holds as *objectives*; they are, in effect, motivations to which no objective element of the offence directly corresponds. If dishonesty, in the specific sense of the 2001 Act were to operate in this way, it would require that the ultimate objective of the accused was to act without a claim of right made in good faith. This would be an unusual

<sup>17</sup> At the time of writing (September 2018), the Commission is engaged in a project on the law of rape, in particular the aspect of the current law that provides that the offence is not committed where the accused has an “honest belief” that there was consent: see *Issues Paper on Knowledge or Belief Concerning Consent in Rape Law* (LRC IP 15-2018), which discusses the analysis of “honest belief” by the Supreme Court in *The People (DPP) v O’R* [2016] IESC 64. In that case, the Court drew an analogy between the “honest belief” defence to a charge of rape under section 2 of the *Criminal Law (Rape) Act 1981* and the absence of good faith in theft offences. In this Report, it is not necessary to consider further this analogy, but the Commission may address it in the Report that will follow from the Issues Paper.

<sup>18</sup> Another alternative classification is to consider the presence of a claim of right made in good faith as a defence. In other words, it would not be part of the offence definition. This is the approach taken by the Criminal Codification Advisory Committee, and it also seems to be reflected in some older cases considering the same phrase as it appeared in the *Larceny Act 1916*. There is nothing in the text of the 2001 Act that suggests that this element is intended to be interpreted as a defence for the purposes of that legislative scheme, however, and in lieu of such express acknowledgement, it seems preferable to describe it as a part of the offence definition under the current law.



and stilted characterisation of the accused's behaviour. Acting dishonestly, even in the legalistic sense of the 2001 Act, is something that is usually done in pursuit of another objective. It is rarely, if ever, an end in itself. The further objective of a deceptive act could itself be morally praiseworthy or blameworthy, the concept of 'white lies' testifies to this. It would therefore be a somewhat skewed interpretation of the offence to characterise dishonesty as an ulterior intention.

### **(b) Deception**

11.19 Deception is defined in the 2001 Act in section 2(2):

“For the purposes of this Act a person deceives if he or she –

- (a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind,
- (b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or
- (c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship, and references to deception shall be construed accordingly.”

11.20 This definition is based on the United States' Model Penal Code, which defines deception in Article 223.3 as follows:

“A person deceives if he purposely:

- (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or
- (2) prevents another from acquiring information which would affect his judgment of a transaction; or
- (3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or
- (4) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

The term 'deceive' does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed."

- 11.21 The Commission previously examined this article of the Model Penal Code in its 1992 *Report on the Law Relating to Dishonesty*.<sup>19</sup> In that Report, the Commission recommended the adoption of a similar provision in Irish law, and this view was largely implemented in the 2001 Act.<sup>20</sup> However, with respect to fault elements of criminal offences, there is a significant difference between the Model Penal Code and the 2001 Act. The Model Penal Code provides that deception must be done *purposely*. In the scheme of the Penal Code, purposeful action reflects the highest level of fault element and is analogous to intention in Irish law.<sup>21</sup> As has been seen already with regard to section 6, and as shall be seen further below, the Irish provisions do not contain many express fault elements; they often merely describe conduct engaged in with the ulterior intention of making a gain or causing a loss.
- 11.22 If there is a fault element that attaches to deception, it must therefore be implied. This can be achieved through statutory construction and the general rule that there is a presumption of a *mens rea*/fault element in serious criminal offences.<sup>22</sup>
- 11.23 It is worthwhile to note briefly that the element of "deception" has been removed from analogous legal provisions in other jurisdictions. The *Theft Act 1968* in the United Kingdom originally provided for a somewhat circular definition of deception as meaning "any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."<sup>23</sup> The *Fraud Act 2006* repealed the "deception" offences in the 1968 Act. The 2006 Act does not use the term "deception" in any of its offence definitions, a direct response to the Law Commission's recommendation to jettison reliance on this term.<sup>24</sup> This Report does not seek to consider this divergence in further detail, as it does not consider the merits or demerits of removing the deception requirement from the 2001 Act offences in Ireland.

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<sup>19</sup> Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

<sup>20</sup> One notable difference is that the 2001 Act did not include provision 223.3(4) of the Model Penal Code – the provision relating to liens, adverse claims or other legal impediments to the enjoyment of property.

<sup>21</sup> Intention has been described as having a "conscious aim, object or purpose" in relation to an element of an offence. See McMullan and Ó Toghda, *Criminal Law* (Round Hall 2012) at 52, quoting the Law Commission of England and Wales, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, 1993), at paragraph 7.5.

<sup>22</sup> The presumption of *mens rea* is discussed further below.

<sup>23</sup> Section 15 of the *Theft Act 1968*.

<sup>24</sup> Law Commission of England and Wales, *Report on Fraud* (LAW COM No 276).

11.24 The Court of Appeal considered the meaning of “deception” in *The People (DPP) v Callanan*.<sup>25</sup> The Court clarified that a deception refers to the creation or reinforcement of a false impression, the prevention of another person acquiring truthful information relating to a transaction and the creation of a false impression to deceive another.<sup>26</sup>

**(c) Making a Gain or Causing a Loss**

11.25 With regard to construing the element of causing a gain or loss, some commentators have argued that the gain or loss must actualise.<sup>27</sup> Other commentators have resisted this view.<sup>28</sup> What little reported authority there is available from the courts also suggests that the gain or loss need not actualise.<sup>29</sup> This is further supported by the ulterior intention view canvassed above.

11.26 In arriving to a view on this point, it is useful to consider some additional points of statutory construction. First, the 2001 Act itself has particular definitions of “gain” and “loss”:

“(3) For the purposes of this Act—

(a) “gain” and “loss” are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent,

(b) “gain” includes a gain by keeping what one has, as well as a gain by getting what one has not, and

(c) “loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.”

11.27 These provisions make clear that gain and loss are economic measures (they must relate to money or property) and that both terms can relate to either things currently within the accused’s possession or things that are not yet in the accused’s possession.

<sup>25</sup> [2017] IECA 169, at paragraph 33.

<sup>26</sup> In the context of the procurement of services by deception, it was therefore irrelevant if the service party would have provided the service anyway based on accurate and truthful information: *Ibid*, at paragraph 35.

<sup>27</sup> Reilly, “The impact of the Unfair Commercial Practices Directive on Irish criminal law” (2006) 16 ICLJ 15. Similarly, Quinn has argued that “[t]he *actus reus* of the [section 6] offence is the making of a gain or the causing of a loss and the inducement of another to do or refrain from doing an act”: Quinn, *Theft and Fraud Offences* (Irish Law Publishing 2003), at 36.

<sup>28</sup> “If the induced does an act as a result of the deception and the accused was acting with the requisite *mens rea*, the offence would appear to be made out even if there was no gain or loss.” McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Round Hall 2011), at 70.

<sup>29</sup> *Minister for Justice and Equality v Antkiewicz* [2014] IEHC 650, at paragraph 18. This also appears to have been the view taken by Judge O’Connor in her direction to the jury in *The People (DPP) v Drumm*, Circuit Criminal Court, 28 May 2018, *The Irish Times*, 29 May 2018.

11.28 Section 54(1) of the 2001 Act offers additional insight:

“In any proceedings for an offence or attempted offence under any of sections 6 and 7 and sections 9 to 11 it shall not be necessary to prove an intention dishonestly to cause a loss to, or make a gain at the expense of, a particular person, and it shall be sufficient to prove that the accused did the act charged dishonestly with the intention of causing such a loss or making such a gain.”

11.29 The italicised text might suggest that the section 6 offence should be interpreted as giving rise to two elements: a conduct element of performing the charged act dishonestly, and an ulterior element of intending to cause a loss or make a gain. If this reading is correct it provides firm support for the view that the gain or loss element is an ulterior intention rather than an objective element. What is criminalised is the treatment of another person as a means to an end (the gain or loss), not the hypothetical resultant state of affairs of that gain or loss.<sup>30</sup>

11.30 Against this, it might be suggested that the emphasised text in the section above merely exempts the prosecution from having to prove the intention to make a gain or cause a loss attaches to a particular identifiable person; rather, the prosecutor must only prove that the accused engaged in an act dishonestly, and they intended to cause a loss or make a gain. In effect, the prosecution need only prove the intention to make a gain or cause a loss in the abstract. This interpretation would put particular weight on the first clause of the highlighted sentence, and less on the second clause. Indeed, it is not necessarily the case that these are mutually exclusive readings. The section could be taken as both clarifying that the intention to make a gain or cause a loss is an ulterior one *and* that the prosecution need not prove the attachment of that ulterior intention to an individual or individuals.

11.31 Therefore, the better view seems to be that making a gain or causing a loss is an ulterior intention element of the offence in section 6. It also performs this function in other offences of which it is an element.

(i) *Dishonesty*

11.32 Prior to the enactment of the 2001 Act, the Commission undertook an analysis of the law relating to dishonesty.<sup>31</sup> It recommended defining this term as ‘the absence of a claim of legal right’ in its Report.<sup>32</sup> The motivation for this recommendation was that the operation of the definition of ‘dishonesty’ in the *UK Theft Act 1968* was thought to be too broad and

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<sup>30</sup> Of course, the actualisation of the gain or loss would be relevant for sentencing purposes. The morally lucky defendant who had all the relevant wicked intentions, none of which came to fruition, would be better off than a similarly situated defendant who succeeded in causing the gain or loss.

<sup>31</sup> Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

<sup>32</sup> *Ibid*, at 145.

had resulted in too much filling of lacunae by judges.<sup>33</sup> The definition was also responding to a particular problem in the *Larceny Act 1916*, which was that in the context of the larceny offence the prosecution could secure a conviction merely by demonstrating that the accused operated without a claim of right, regardless of his honesty or dishonesty.<sup>34</sup>

11.33 The recommendation of the Commission in its prior Report to define dishonesty as the absence of a claim of right was not implemented.<sup>35</sup> The definition from the 1916 Act was retained.<sup>36</sup> The only difference between the two definitions is the ‘good faith’ rider. Given that the originally problematic term ‘fraudulently’ does not appear in the 2001 Act’s offence definitions, it seems that the problems that arose under the 1916 Act were effectively addressed through this means.

11.34 The meaning of the phrase “claim of right made in good faith” means received some judicial attention in the context of the *Larceny Act 1916*. In *The People (Attorney General) v Grey*<sup>37</sup> the defendant was accused of taking certain company property contrary to section 20(1)(2) of the 1916 Act.<sup>38</sup> The Court of Criminal Appeal endorsed the statement that “[f]raud is inconsistent with a claim of right made in good faith to do the act complained of” and if an accused “honestly believes” they are entitled to take the relevant property, then they are entitled to be acquitted even if this belief is unfounded in law or fact.<sup>39</sup> This “honest belief” description of a claim of right made in good faith was also endorsed in *The People (DPP) v O’Loughlin*.<sup>40</sup> The Court of Criminal Appeal there quoted with approval the following passage from *R v Bernhard*: “a person has a claim of right,

<sup>33</sup> *Ibid*, at 141.

<sup>34</sup> *Ibid*, at 145. This was an effect of the judicial interpretation of the term “fraudulently” in section 1 of that Act as meaning something like “acting intentionally (without mistake) in the absence of a claim of right”: *R v Williams* [1953] 1 QB 660. It is questionable what this adds to the offence. As drafted, it already required the claim of right to be in good faith. Nevertheless, because it seems that the clause “without a claim of right made in good faith” was interpreted as a defence in the 1916 Act, it would be sufficient for the prosecution, on the interpretation of “fraudulently” in *Williams*, to demonstrate that the accused acted intentionally (without mistake) and without a claim of right. The accused could then attempt to prove that they acted in good faith as a defence, considering that the prosecution would presumably already have had to have proved that they acted without a claim of right. In *The People (Attorney General) v Grey* [1994] IR 326 it was suggested that “fraud” meant something more along the lines of “prevailing social standards of dishonesty”, not merely an absence of a claim of right. This was stressed as the defining characteristic of fraud.

<sup>35</sup> Official materials on the legislative process reveal that the difference between the Commission’s recommendation and the previous definition under the 1916 Act was not particularly well attended: Select Committee on Justice, Equality, Defence and Women’s Rights Debate, *Criminal Justice (Theft and Fraud Offences) Bill 2000: Committee Stage Thursday, 21 June 2001*.

<sup>36</sup> Section 2(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>37</sup> [1944] IR 326.

<sup>38</sup> This provision stated that “Every person who... being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company.”

<sup>39</sup> [1944] IR 326, at 333.

<sup>40</sup> [1979] IR 85.

within the meaning of the section, if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.”<sup>41</sup> As McGreal puts it, “[t]he focus of belief in a claim of right, then, is not whether the claim in question is correct or the belief is reasonable but whether it is sincere.”<sup>42</sup> McCutcheon, in his analysis of the *Larceny Act 1916* concluded that it was “well established that a claim of right need not be founded on a right recognised by law; it is sufficient that the accused honestly believed that he was entitled to take the goods.”<sup>43</sup>

11.35 Focusing solely on the *honesty* of the belief can pose difficulty, given the subjective nature of honesty. To make matters more confusing, it is arguable that the concept applied as a defence under the old law<sup>44</sup> but it seems to be a substantive part of the offence under the 2001 Act. This requires that in every case of fraud the prosecution must notionally prove that the defendant acted without a claim of right in good faith. This goes beyond the old situation under the 1916 Act, where it was sufficient for the prosecution to prove that the defendant acted without a claim of right and it was then open to the defendant to plead good faith/honest belief as a defence.

(ii) *Inducement to Act or Refrain from Acting*

11.36 In order to satisfy the elements of section 6 of the 2001 Act, the accused must induce the victim of the deception to do or refrain from doing “an act”. The 2001 Act does not elaborate on what constitutes “an act.” Because the act can be refrained from as well as performed, it is clear that there is considerable latitude afforded in making out this element of the offence. It is possible that the inducement to do or refrain from doing the act serves to demonstrate that the deception is working on the mind of the victim. Quinn seems to take this view. As he says, “[t]he requirement is that another must be induced to do or refrain from doing. Thus if a person is not deceived the offence is not committed.”<sup>45</sup> The word “by” in the offence indicates a clear causal connection between the act that is

<sup>41</sup> [1938] 2 KB 264, at 270.

<sup>42</sup> McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Thomson Reuters Round Hall 2011), at 20.

<sup>43</sup> McCutcheon, *The Larceny Act 1916* (Round Hall 1988), at paragraph 34. This is supported by both *R v Bernhard* [1938] 2 KB 164 and *Attorney General v Grey* [1944] IR 326.

However, it is instructive to view this in light of the application of objective and subjective approaches to dishonesty under the *Theft Act 1968*. *R v Ghosh* [1982] EWCA Crim J0405-1, [1982] QB 1053 set out what is effectively a two-tier test for dishonesty: (1) did the defendant have the intention that he claims to have had and (2) if so, would most people think that he therefore did not act dishonestly? This requires both that the accused is aware both of their dishonesty and that others would find their conduct dishonest. However, objectively, the conduct must be dishonest by the standards of ordinary people. This puts a somewhat objective gloss on an otherwise subjective test. See generally Arlidge, Fisher, Milne and Sprenger, *Arlidge and Parry on Fraud* 5th ed (Sweet and Maxwell 2016) at paragraphs 2-018 to 2-031.

The House of Lords ruled recently that the subjective limb of *Ghosh* should be discarded and no future jury directions should be based on it: *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, at paragraph 74.

<sup>44</sup> *Attorney General v Grey* [1944] IR 326, at 333.

<sup>45</sup> Quinn, *Theft and Fraud Offences* (Irish Law Publishing, 2003) at 36.

induced and the act of deception that instigates it.<sup>46</sup> The induced act therefore cannot involve something that demonstrates an absence of deception, such as a call to the Gardaí to report the deception. Though this is obviously an “act” and has occurred immediately after the act of deception, the fact that the subject of the deception has not been deceived means that subsequent acts cannot be said to have been induced “by deception.” In other words, it is not enough that the deceptive act and the act induced are relatively coincidental; the former must cause the latter.

11.37 The inducement to do or refrain from doing an act as a result of a deception may, and often will, give rise to a specific and tangible prejudice to the victim of the deception. However, this is not necessarily required for the offence, since the “act” requirement is very broad and could conceivably be a benign action that results in no monetary disadvantage but would not have been done if not for the deception. As McGreal notes, in the context of section 6, “[t]here is... a conspicuous absence of any definition of prejudice in this instance.”<sup>47</sup> In reading the statute strictly, there is no prejudice requirement.<sup>48</sup>

11.38 It is clear from the above that the inducement to act is quite permissive. It encompasses a broad variety of acts that can be induced. The more significant qualifier is the requirement of a causal connection between the accused’s deceptive act and the complainant’s act that is thereby induced.

## 2. The Presumption of *Mens Rea*

11.39 The presumption of *mens rea* is a principle for interpreting criminal legislative provisions. It provides that even in circumstances where an offence does not expressly provide for a fault element corresponding to an objective element of the crime, there is a presumption that it is a more accurate reflection of the intention of the Oireachtas to read a fault element into that element of the offence. This presumption may, of course, be rebutted where there is a clear intention that the Oireachtas intends an offence to be one of strict, where some objective elements of the offence have no corresponding fault element, or absolute, where no objective element of the offence has a corresponding fault element, liability.

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<sup>46</sup> There has been some difficulty in the English courts regarding the appropriate test to be applied in determining whether a deception “caused” something: *Metropolitan Police Commissioner v Charles* [1977] AC 177. The test has been characterised by Ashworth as one of “hypothetical” rather than “actual” causation; that is, the test is whether or not the victim would have acted in the same way had they known the true position. Ashworth, *Principles of Criminal Law* 4th ed (2003 OUP) at 402.

<sup>47</sup> McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Thomson Reuters Round Hall 2011), at 70.

<sup>48</sup> However, it is arguable that a victim of a fraud is always prejudiced. While they may not suffer physical harm or pecuniary loss, a fraud will always violate the claimant’s autonomy.

11.40 The principle of the presumption of *mens rea* is well summarised by Lord Goddard CJ in *Brend v Wood*:<sup>49</sup>

“It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”<sup>50</sup>

11.41 This passage was cited with approval by the UK House of Lords in *Sweet v Parsley*<sup>51</sup> in which the accused managed premises that had been used for the purposes of smoking cannabis. The House of Lords found that she could not be convicted of any crime since she had been unaware of the drug use in these premises. Lord Reid stated:

“Sometimes the words of the section which creates a particular offence make it clear that *mens rea* is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*.”<sup>52</sup>

11.42 In *The People (DPP) v Murray* the Supreme Court accepted Lord Reid’s analysis.<sup>53</sup> Henchy J approved it as the “correct rule of interpretation” and suggested that it applied not just to the whole offence, but to each constituent part of the objective elements of the offence.

11.43 The elements of the presumption of *mens rea* were considered somewhat more analytically in *Gammon v Attorney General of Hong Kong*.<sup>54</sup> Lord Scarman set out the following principles for the application of the presumption:

“(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;

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<sup>49</sup> [1946] 175 LTR 306.

<sup>50</sup> *Ibid*, at 307.

<sup>51</sup> [1969] 1 All ER 347.

<sup>52</sup> *Ibid*, at 349.

<sup>53</sup> [1977] IR 360, at 399; see also *CC v Ireland* [2006] 4 IR 1, at 47 per Geoghegan J: “That speech of Lord Reid is of the utmost importance as it is the foundation of all the modern jurisprudence in England in favour of the presumption of *mens rea* and it is of considerable interest that it was expressly approved of by Henchy J.” See also the judgment of Denham J in this case in which she opined, in relation to Lord Reid’s statement, “I am satisfied that this statement reflects the common law in this jurisdiction also and I would adopt and apply this statement.”

<sup>54</sup> [1985] AC 1.



(2) The presumption is particularly strong where the offence is truly criminal in character;

(3) The presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the Statute;

(4) The only situation in which the presumption can be displaced is where the Statute is concerned with an issue of social concern, and public safety is such an issue;

(5) Even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the Statute by encouraging greater vigilance to prevent the commission of the prohibited act.”<sup>55</sup>

11.44 These 5 propositions have been endorsed in several judgments of the Irish courts.<sup>56</sup>

However, the presumption can also be rebutted in appropriate circumstances. In *Reilly v Patwell*,<sup>57</sup> McCarthy J set out a non-exhaustive list of factors to be considered in deciding whether the presumption is defeated. These factors are:

- The moral gravity of the offence.
- The social stigma attached to the offence.
- The penalty.
- The ease (or difficulty) with which a duty is discharged or the law obeyed.
- Whether or not absolute liability would encourage obedience.
- The ease or difficulty with which the law might be enforced.
- The social consequences of non-compliance.
- The desideratum to be achieved when considering the statutes.<sup>58</sup>

11.45 It is clear that all of the fraud offences in the 2001 Act under consideration in this chapter, including those which require an act of deception as part of the conduct element, do not contain words that clearly displace the presumption that each constituent part of the

<sup>55</sup> [1985] AC 1, at 14.

<sup>56</sup> *Maguire v Shannon Regional Fisheries Board* [1994] IEHC 4, [1994] 3 IR 580; *Shannon Regional Fisheries Board v Cavan County Council* [1996] IESC 7, [1996] 3 IR 267; *Minister for The Environment v Leneghan* [2009] IEHC 226, [2009] 3 IR 727; *Coleman v Ireland* [2004] IEHC 288.

<sup>57</sup> [2008] IEHC 446.

<sup>58</sup> [2008] IEHC 446, at paragraph 52.

objective elements of the offence should correspond with a fault element. In addition, these offences provide for potentially serious penalties and are morally grave.<sup>59</sup>

11.46 Therefore, it is clear that an act of deception such as the creation of a false impression is conduct that requires a corresponding fault element, such as intention or recklessness. The Commission gives thorough consideration to the hierarchy of culpability in relation to the fault elements of criminal offences elsewhere in this Report.<sup>60</sup> It is not proposed to retrace this ground here.

11.47 Given that the presumption of *mens rea* suggests that there must be some fault element in the 2001 Act fraud offences, it must be determined what that fault element is. Take the conduct element of “by deception, inducing another to act or refrain from acting”. McGreal suggests that deception will normally require: “(1) the complainant thought that the defendant expressly or impliedly communicated the existence of certain facts, and (2) the defendant intended the complainant to believe those purported facts”.<sup>61</sup>

11.48 McGreal’s suggestion is effectively a conduct element (some representation by the defendant), a result element (the belief of the complainant in express or implied meaning of that representation) and a fault element (intention of the defendant that the complainant believes those express or implied facts). Although this is not on all fours with the analysis supplied in the table at the beginning of this chapter, it is notable for singling out intention as the proper fault element.

11.49 If deception requires intention as its fault element, an accused must have the conscious aim of creating a false impression in the mind of the complainant. It does not seem to be the case that reckless deception suffices for the Act. McGreal has flatly noted that “[t]he Irish definition [of deception] does not extend to recklessness as it does in England”.<sup>62</sup>

11.50 Given that there is at least some good ground to believe that intention is the fault element that properly attaches to the deception element of the offence, it is likely that it attaches to other significant objective elements as well. It has been noted that it is at least possible to read subjective recklessness into an offence under the presumption of *mens rea*;<sup>63</sup> however, there are no instances of this occurring in the Irish courts to date.

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<sup>59</sup> The lowest maximum sentence between these offences is 5 years’ imprisonment. This entails that they are arrestable offences, as provided for in section 2(1) of the *Criminal Law Act 1997*. They would also be considered serious offences under section 1(1) of the *Bail Act 1997*.

<sup>60</sup> See Chapter 9, above.

<sup>61</sup> McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Thomson Reuters Round Hall 2011), at 32.

<sup>62</sup> *Ibid.*

<sup>63</sup> Prendergast, “Strict Liability and the Presumption of Mens Rea after *CC v Ireland*” (2011) 46 *Ir Jur* 211, at 213.

### 3. Obtaining services by deception

11.51 The offence in section 7 of the 2001 Act reads as follows:

“(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence.

(2) For the purposes of this section a person obtains services from another where the other is induced to confer a benefit on some person by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.”

11.52 The difficulty of categorising dishonesty as a fault element or an objective element has been canvassed above with respect to section 6 of the 2001 Act. That analysis is not repeated here. It is assumed for the purposes of this section, and the sections that follow, that dishonesty is a circumstance element of the 2001 Act offences.

	Conduct	Circumstance	Circumstance	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Accused engages in a deceptive act	Without a claim of right	Services are obtained (by deception)	n/a
<b>Fault Elements</b>	n/a	Intention	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.2 The Offence in Section 7

11.53 This section only differs from section 6 insofar as it specifies with greater precision the required kind of reliance on a deceptive representation by the defendant. It is inspired by a similar offence in section 1 of the UK *Theft Act 1978* in the UK.<sup>64</sup> In the context of the statutory landscape of the UK the offence filled a more identifiable niche; the prior fraud offences in the *Theft Act 1968* specifically related to obtaining property by deception<sup>65</sup> or obtaining a money transfer by deception.<sup>66</sup> Therefore, a lacuna existed where a deception

<sup>64</sup> Since repealed by the *Fraud Act 2006*.

<sup>65</sup> Section 15 of the *Theft Act 1968*.

<sup>66</sup> Section 15A of the *Theft Act 1968*.

related to a service that was not a money transfer. Section 1 of the 1978 Act addressed this issue.

11.54 In the Irish context, where section 6 provides for a very wide fraud offence, it is not clear what advantage section 7 offers as it does not seem to perform the same gap-filling function that its UK analogue did. This is not to say, however, that it is never used. The Court of Appeal considered the offence in *The People (DPP) v Callanan*.<sup>67</sup> The defendant in this case had charged the fee for rental of a bouncy castle and minibus to a Vocational Education Committee of which she was an employee. The instruction as to this mode of payment was taken to constitute both dishonesty and an intention to make a gain. The Court took the opportunity to clarify the point that all the references to “another” in section 7(1) must refer to the victim party; that is, the deception must operate in the mind of the service provider and the service provider must be aware of the deceit (though the provider need not be aware that the information is based on deception or dishonesty).<sup>68</sup>

#### 4. Unlawful use of a computer

11.55 The offence in section 9 of the 2001 Act reads as follows:

“A person who dishonestly, whether within or outside the State, operates or causes to be operated a computer within the State with the intention of making a gain for himself or herself or another, or of causing loss to another, is guilty of an offence.”

11.56 An elemental analysis of the offence in section 9 can be presented as follows:

	Conduct	Circumstance	Circumstance	Ulterior Intention
<b>Objective Elements</b>	Any act	Accused operates a computer, or causes one to be operated	Without a claim of right	n/a
<b>Fault Elements</b>	n/a	Intention	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.3 The Offence in Section 9

11.57 This offence is notable for lacking a result element. If, as is the case with sections 6 and 7, the gain or loss described in the offence does not need to actualise, then it seems that no result need obtain here. It would notionally be sufficient for liability under this section for

<sup>67</sup> [2017] IECA 169.

<sup>68</sup> *Ibid*, at paragraph 32.

a defendant to operate a computer without a claim of right made in good faith, with the intention of causing a gain or loss, even where that does not ultimately occur.

11.58 The ambit of this offence is, therefore, potentially exceptionally wide. Consider a hypothetical scenario involving two parties, A and B. Both A and B possess identical laptop computers. A takes the laptop he believes to be B's and uses it to sell property he (A) owns through eBay. However, it transpires that in fact A had used his own computer. It seems that even this innocuous hypothetical may have the makings of a criminal offence under section 9. A has operated a computer (conduct) without a claim of right made in good faith (he believed he was operating B's computer) to make a gain for himself (sell his property on eBay).

11.59 It is not necessary in this Report to make substantial recommendations on the present state of this offence. In terms of accounting for the breadth of fraud offences in Ireland presently, it suffices to note that section 9 is capable of potentially capturing a wide range of conduct. If anything, there is a risk that section 9 is too broad in its ambit.

## 5. False accounting

11.60 The offence in section 10 of the 2001 Act reads as follows:

“(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—

(a) destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose,

(b) fails to make or complete any account or any such document, or

(c) in furnishing information for any purpose produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.

(2) For the purposes of this section a person shall be treated as falsifying an account or other document if he or she—

(a) makes or concurs in making therein an entry which is or may be misleading, false or deceptive in a material particular, or

(b) omits or concurs in omitting a material particular therefrom.”

11.61 Unlike the sections considered above, the clearest way to represent section 10 is as creating several discrete offences. The following elemental offences can be constructed from section 10:

	Conduct	Circumstance	Circumstance	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Document is made or required for any accounting purpose	Without a claim of right	Destroys, defaces, conceals or falsifies any account or any document	n/a
<b>Fault Elements</b>	n/a	Intention	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.4 The Offence in Section 10(1)(a)

	Conduct	Circumstance	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Without a claim of right	Fails to make or complete any account or accounting document	n/a
<b>Fault Elements</b>	n/a	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.5 The Offence in Section 10(1)(b)

	Conduct	Circumstance	Circumstance	Result	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Account or document is or may be misleading, false or deceptive in a material particular	Without a claim of right	Furnishes information	Produces, or makes use of any document or any such document	n/a
<b>Fault Elements</b>	n/a	Knowledge	Intention / Knowledge	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.6 The Offence in Section 10(1)(c)

11.62 In addition to the elemental analyses above, section 10(2)(a) goes on to clarify that falsification of an account or document includes (but is not necessarily limited to) making or concurring in making an entry which is or may be misleading, false or deceptive in a material particular. Section 10(2)(b) clarifies that certain omissions may also suffice for false accounting.

11.63 Section 10 is substantially based on section 17 of the UK *Theft Act 1968*. Having regard to some of the judicial consideration of that provision by the courts of England and Wales is, therefore, partly instructive. However, caution must be exercised here as there are significant differences between the English and Irish courts in the treatment of general principles of criminal law.

**(a) Section 10(1)(a)**

11.64 Some difficulty has arisen with regard to ascertaining the meaning of “made or required for any accounting purpose” in the English case law that applies to the analogue of section 10(1)(a).<sup>69</sup> Ormerod and Laird note that “the courts have failed to adopt a consistent approach to identifying whether particular documents were made or required for accounting purposes.”<sup>70</sup> This is echoed by Arlidge and Parry.<sup>71</sup> This inconsistency is instantiated in the disparity between the following two cases: *R v Okanta* and *R v O*.

11.65 *R v Okanta*<sup>72</sup> concerned an application form for a building society mortgage upon which the defendant had falsified her salary, stating it was £21,750 when in reality it was £8,500. The Court of Appeal found that this falsified application form was not made for an accounting purpose because it was a mere reference or confirmatory letter. However, in *R v O*<sup>73</sup> a mortgage application containing falsified information was held by the Court of Appeal to be made for an accounting purpose because “[a]pplications for a mortgage or loan to commercial institutions will, if successful, lead to the opening of an account which will show as credits in favour of the borrower funds received by the borrower and as debits funds paid out by the lender to, or on behalf, of the borrower.”<sup>74</sup> Hooper LJ

<sup>69</sup> Section 17 of the *Theft Act 1968*.

<sup>70</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015), at 1050.

<sup>71</sup> Arlidge, Milne, Sprenger and Fisher, *Arlidge and Parry on Fraud* 5th ed (Sweet and Maxwell 2016), at 262: “The courts have not been entirely consistent in their willingness to treat a document as being required for an accounting purpose in the absence of evidence as to how it would be used.”

<sup>72</sup> [1997] Crim LR 451.

<sup>73</sup> [2011] 1 WLR 2936.

<sup>74</sup> [2011] 1 WLR 2936, at 2951.

acknowledged, in coming to this decision that “[i]t is very difficult if not impossible to reconcile all the cases on the point.”<sup>75</sup>

11.66 This difficulty may replicate itself in the Irish courts. As there is a dearth of reported judgments on offences under the 2001 Act, it is difficult to determine whether this has happened or is likely to happen. A factor that may mitigate this risk is the existence of the broad offences under sections 6 and 7, considered above. Falsified mortgage applications, as in the English cases considered above, would be covered by the offence of obtaining services by deception in section 7. Indeed, section 7(3) specifies that loans come under the purview of that offence. Section 7 carries two further material differences to section 10 with respect to how both might apply to loans procured under false pretence: (a) section 7 requires dishonesty, and (b) section 7 also requires that the loan have been created. While there may still be the possibility of lacunae arising between section 7 and section 10, it does not seem likely that these would mirror the lacunae that have arisen in English law.

11.67 It is also notable that the English offence is strict with regard to the element of whether or not a document is made for an accounting purpose. So, if an individual falsifies or destroys a document that is for accounting purposes, but he is unaware of this, he will nevertheless be liable under section 17 of the *Theft Act 1968*.<sup>76</sup> Ormerod and Laird have criticised this as an “objectionable” element in a serious offence.<sup>77</sup> It does not seem likely that the Irish provision is strict in this regard.

11.68 Although there has been considerable analysis of the fault elements in section 17 of the *UK Theft Act 1968* in the English courts, these are of limited value. The examination in *R v Atkinson* expounds on the definition of “dishonesty” in the UK legislation.<sup>78</sup> Given that “dishonesty” is idiosyncratically defined in the 2001 Act in Ireland, this jurisprudence is of little interpretive value for Irish courts.

#### **(b) Section 10(1)(b)**

11.69 The failure to make or complete any account or any document for any accounting purpose is “entirely new” as a conduct element of the offence of false accounting.<sup>79</sup> There is no equivalent UK provision in the *Theft Act 1968*. The Commission in 1992 did not recommend a formulation that went further than section 17 and included the failure to make or complete accounts or accounting documentation.<sup>80</sup> However, in reality, section 10(1)(b) does not go further than 10(1)(a) because the definition of “falsification” in that

<sup>75</sup> Citation?

<sup>76</sup> *Graham* [1997] 1 Cr App R 302, at 314.

<sup>77</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 15th ed (2015 OUP), at 1057.

<sup>78</sup> [2004] Crim LR 226.

<sup>79</sup> McGreal, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Round Hall 2011) at 76.

<sup>80</sup> Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).



section includes circumstances where a “person omits or concurs in omitting a material particular therefrom.”<sup>81</sup>

11.70 To understand why section 10(1)(b) was included in the Irish fraud scheme, it is useful to have regard to the difficulties encountered by the UK courts in *R v Shama*.<sup>82</sup> In this case the defendant was accused under the UK equivalent to section 10(1)(a) of the 2001 Act, for falsifying a “charge ticket”. The defendant was an international telephone operator employed by British Telecommunications plc and had connected a London subscriber of the phone service to an overseas subscriber and failed to fill in the necessary charge ticket so that the London subscriber was not charged. This failure to fill in the document, which was required for an accounting purpose, was conduct for which the defendant was found liable under section 17(1)(a) of the 1968 Act. However, in order for liability to be imposed, the interpretation of section 17(1)(a) offered by the court was a strained one.<sup>83</sup> There would be no need to stretch section 10(1)(a) in Ireland in a similar way, given the existence of subsection (1)(b).

### (c) Section 10(1)(c)

11.71 The case law of the English courts has clarified some ambiguities on what a “material particular” for the purposes of this section might be. In *R v Mallett*,<sup>84</sup> the Court held that the particular does not have to directly connected with the accounting purpose of the document:

“the purpose for which the information is furnished is not limited to an accounting purpose; the document itself has to be made or required for an accounting purpose but once that is satisfied then any statement that is false in a material particular is sufficient to justify a conviction once the other requirements of the section are also satisfied.”<sup>85</sup>

11.72 Later cases have clarified that the test to be applied as to whether something is a material particular is an objective one (at least in the context of the omission of details from an application form).<sup>86</sup>

11.73 Aside from these cases, there is not much overlap between the English and Irish provisions on contentious or ambiguous points.

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<sup>81</sup> Section 10(2) of the 2001 Act.

<sup>82</sup> [1990] 2 All ER 602.

<sup>83</sup> The note for this offence in the 1995 Heads of Bill suggest that the decision of the court in *Shama*, was a “strained” interpretation, which was taken to enable a response to a “clearly” wrongful act.

<sup>84</sup> *R v Mallett* [1978] EWCA Crim J0417-5, [1978] 1 WLR 820.

<sup>85</sup> *Ibid*, at 822.

<sup>86</sup> *R v Lancaster* [2010] EWCA Crim 370, [2010] 1 WLR 2558, at paragraph 30.

## 6. Suppression, etc of documents

11.74 The offence in section 11 of the 2001 Act reads as follows:

“(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.

(2) (a) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception procures the execution of a valuable security is guilty of an offence.

(b) Paragraph (a) shall apply in relation to—

(i) the making, acceptance, endorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and

(ii) the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security,

as if that were the execution of a valuable security.

(3) In this section, “valuable security” means any document—

(a) creating, transferring, surrendering or releasing any right to, in or over property,

(b) authorising the payment of money or delivery of any property, or

(c) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation.”

11.75 As with section 10, it is conceptually easier to separate section 11 into several discrete offences:

	Conduct	Circumstance	Circumstance	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Destruction, defacement, or concealment of any valuable security, any will or other testamentary document	Without a claim of right	Destroys, defaces, or conceals	n/a
<b>Fault Elements</b>	n/a	Intention / Knowledge	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.7 The Offence in Section 11(1)

	Conduct	Circumstance	Result	Ulterior Intention
<b>Objective Elements</b>	Any act	Without a claim of right	By any deception, procures the execution of a valuable security	n/a
<b>Fault Elements</b>	n/a	Intention / Knowledge	Intention / Knowledge	Intention of making a gain or causing a loss

Table 11.8 The Offence in Section 11(2)

**(a) Section 11(1)**

11.76 As section 11 shares substantial elements – dishonesty, destruction, defacement or concealment – it can be treated relatively more briefly. The only substantial difference between this offence and section 10 is that the section 11 offences relate to valuable securities. These are also defined in the Act and, therefore, do not pose much additional difficulty.

11.77 This section is worded similarly to section 20 of the UK *Theft Act 1968* and the meaning of “destroy, deface or conceal” should not cause difficulty. In carrying out this conduct, an accused must act dishonestly and with the intention to make a gain or cause a loss. These elements have already been considered above

**(b) Section 11(2)**

11.78 For present purposes, the offence in section 11(2) does not differ in any sufficiently substantial manner from the offence in section 11(1). Procuring the execution of a security is, of course, distinct from destroying one but this difference is not significant for present purposes.

11.79 There is some overlap between this offence and section 6 of the 2001 Act. Where a person dishonestly procures the execution of a valuable security by deception with the intention of making a gain or causing a loss, they are also inducing an act by deception with the intention of making a gain or causing a loss. Section 11(2) can be entirely subsumed within section 6 for this reason. However, as it carries a higher maximum sentence, the offences may be used to cover more aggravated forms of fraudulent behaviour. This Report does not address the question as to the appropriate maximum sentences for the fraud offences in the 2001 Act, but this issue may need consideration in the context of implementing the recommendations for reform made in the Report.

## 7. Conspiracy to Defraud and US Wire Fraud

11.80 Conspiracy to defraud is not a part of the 2001 Act's scheme of dishonesty offences. It is a common law offence. It shall thus be considered separately. This offence was analysed by the Commission in its prior report on Inchoate Offences<sup>87</sup> and also in its report on the Law Relating to Dishonesty.<sup>88</sup> In both reports, it was recommended that the offence be preserved as-is.

11.81 Conspiracy to defraud is committed when the following elements are made out:

Two or more people agree:

To deprive, by dishonesty, a person of something which is his or to which he is, would, or might be entitled

OR

To injure some proprietary right of that person.<sup>89</sup>

11.82 The use of the phrase "dishonesty" in the above definition might give the misleading impression that the term bears the same meaning as it does in the 2001 Act. This is not, however, the case. The Irish Court of Appeal recently confirmed this.<sup>90</sup> One of the questions before the Court in this case was the meaning of dishonesty for the purposes of

<sup>87</sup> Law Reform Commission, *Report on Inchoate Offences* (LRC 99-2010).

<sup>88</sup> Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992).

<sup>89</sup> This definition is a slightly adapted form of that set out by Viscount Dilhorne in *Scott v Metropolitan Police Commissioner* [1975] AC 819, at 840. This definition was adopted by the Irish High Court in *Miles v Sreenan* [1999] 4 IR 294, at 298, and by the Irish Supreme Court in *Attorney General v Oldridge* [2000] 4 IR 593.

In the original quotation elements (a) and (b) are referred to conjunctively "... an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be entitled *and* an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud" (emphasis added). It is more plausible to consider these elements as severally sufficient alternatives, rather than jointly necessary elements.

<sup>90</sup> *The People (DPP) v Bowe and Casey* [2017] IECA 250.

conspiracy to defraud. The Court considered, but ultimately rejected, the idea that it might adopt the *Feely/Ghosh* formulation of the English courts.<sup>91</sup> If this were to be the applicable standard, the jury would have to be satisfied that “what was done was done intentionally by the accused and was objectively dishonest according to the standards of reasonable persons, but also that the accused subjectively had understood or appreciated it to be so”.<sup>92</sup> Ultimately, however, the Court confirmed that “it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the impugned act or to participate in the impugned scheme in circumstances where the relevant act or scheme would attract the value judgment, judged by the standards of ordinary reasonable men, that it was dishonest”.<sup>93</sup> In other words, conspiracy to defraud does not require a specific *mens rea* of subjectively dishonest intent; it suffices to establish a general intention to participate in a scheme, where that scheme would be regarded as objectively dishonest.<sup>94</sup>

11.83 This point about dishonesty aside, the leading case Supreme Court case on conspiracy to defraud is *Attorney General v Oldridge*.<sup>95</sup> Here the respondent was resisting an extradition order based on a prosecution for wire fraud in the United States.<sup>96</sup> The question for the Court was whether there was an Irish offence that corresponded to wire fraud. Given that the discussion of conspiracy to defraud in Ireland is made relative to a discussion of wire fraud in the United States, and the purpose of this section of the report is to ascertain whether or not the introduction of a wire fraud-type offence in Ireland is desirable, it is useful to briefly consider the operation of that foreign offence.

11.84 The definition of wire fraud is as follows:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such

<sup>91</sup> From the cases *R v Feely* [1973] QB 530 and *R v Ghosh* [1982] QB 1053.

<sup>92</sup> *The People (DPP) v Bowe and Casey* [2017] IECA 250, at paragraph 168.

<sup>93</sup> *Ibid*, at paragraph 174.

<sup>94</sup> *Ibid*, at paragraph 175. This development has also been mirrored by the English courts in *Ives v Genting Casinos* [2017] UKSC 67, [2018] 2 All ER 406. This case abolished the subjective limb of the *Ghosh* test.

<sup>95</sup> [2000] 1 IR 593. The offence was also briefly alluded to by the Court of Appeal in *The People (DPP) v Bowe and Casey* [2017] IECA 250.

<sup>96</sup> For the similarities, and differences, between Irish fraud offences and the American wire and mail fraud offences, see: Mary Travers, “Mail and Wire Fraud: the United States Prosecutors’ ‘True Love’ – Should Equivalent Offences be Enacted in Ireland Part I” (2014) 24 *ICLJ* 46; Mary Travers, “Mail and Wire Fraud: the United States Prosecutors’ ‘True Love’ – Should Equivalent Offences be Enacted in Ireland Part II” (2014) 24 *ICLJ* 73.

scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.<sup>97</sup>

11.85 The definition of the mail fraud offence is similar.<sup>98</sup> The elements of both have been summarised as requiring that the prosecution prove beyond reasonable doubt that the defendant perpetrated a scheme:

- (1) To defraud by means of a material deception;
- (2) With the intent to defraud;
- (3) While using the mails, private commercial carriers, and/or wires in furtherance of that scheme
- (4) That did result, or would have resulted, in the loss of money or property or the deprivation of honest services.<sup>99</sup>

11.86 The requirement of a scheme to defraud has been interpreted quite widely, with one court suggesting that it require “a departure from fundamental honesty, moral uprightness, and candid dealings in the general life of the community”.<sup>100</sup> The material deception requirement is similarly lax; it is made out where “the defendant knows, or should know, that the victim is likely to regard the misrepresented facts as important”.<sup>101</sup> There is no requirement of actual reliance by the victim.<sup>102</sup>

11.87 Similar to the Irish offences under the 2001 Act, the mail and wire fraud offences do not require that the loss to the victim actualise.<sup>103</sup> Nor is the loss confined to tangible interests; in *Carpenter v United States* the Supreme Court confirmed that mail and wire fraud protect intangible property as well.<sup>104</sup> Again, similar to the Irish statutory offences, it is a defence to mail and wire fraud if the defendant can establish that they acted in good faith.<sup>105</sup>

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<sup>97</sup> 18 USC § 1343.

<sup>98</sup> 18 USC §1341.

<sup>99</sup> Singh, Lyons, and Scudieri, “Mail and Wire Fraud” (2017) Am Crim L Rev 1555, at 1557. This is an excellent overview of a series of case law that is notoriously complex: see the remarks of Allen, “The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the *Nuella Poena* Principle” (1987) 29 Ariz L Rev 385, at 405.

<sup>100</sup> *United States v Hammen* 977 F2d 379, 383 (7th Cir 1992).

<sup>101</sup> *United States v Svete* 556 F3d 1157, 1165-70 (11th Cir 2009).

<sup>102</sup> *Neder v United States* 527 US 1, 20-25 (1999).

<sup>103</sup> *United States v Riley* 621 F3d 312, 327 (3d Cir 2012); *United States v Williams* 527 F3d 1235, 1245 (11th Cir 2008).

<sup>104</sup> *Carpenter v United States* 484 US 19, 25 (1987).

<sup>105</sup> *United States v Robertson* 709 F3d 741, 746 (8th Cir 2013); *United States v Brown* 478 F3d 926, 928 (8th Cir 2007); *United States v Sherer* 653 F2d 334, 338 (8th Cir 1981).

11.88 The most striking aspect of these offences is their potential to cover actions that are highly inchoate in nature. On the face of the statute, little more is required than having an intent or scheme to defraud, and the issuance of mail or wires in furtherance of that fraudulent scheme. While it is true that the application of the offences has not been strictly faithful to the words on the page, it has not been expanded in a way that has generally narrowed its scope.

11.89 The *Oldridge* judgment, mentioned above, clarified that the fraud aspect of the conspiracy to defraud offence was wider than the offence of obtaining money by false pretences that existed at the time.<sup>106</sup> The modern iteration of this offence is section 6 of the 2001 Act, also considered above.<sup>107</sup> As is clear from the discussion above, the offence in section 6 has the widest reach of any of the fraud offences considered.

11.90 *Oldridge* also made it clear that conspiracy to defraud effectively occupied the same niche in Irish law as the wire and mail fraud offences do in the federal US system.<sup>108</sup> Given that there is substantial overlap between these offences, it does not seem to be the case that if conspiracy to defraud is maintained that there would be a strong case for introducing an offence along the lines of mail or wire fraud in Ireland. *Oldridge* would seem to suggest that such an offence would be largely defunct.

**R 11.01 The Commission recommends that the common law offence of conspiracy to defraud be retained.**

**R 11.02 The Commission recommends that, as current Irish law contains the essential elements of the US mail and wire fraud offences, such offences need not be introduced in this jurisdiction.**

## 8. Conclusions

11.91 It is clear that in none of the offences currently operative under the *Criminal Justice (Theft and Fraud Offences) Act 2001* can recklessness suffice to attach criminal liability. A further point establishing this, which was not discussed above, is that in Part 3 of the Act, “reckless[ness]” is given a specific meaning. This is given by section 16:

“For the purposes of Part [3 of this Act], a person is reckless if he or she disregards a substantial risk that the property handled is stolen, and for those purposes “substantial risk” means a risk of such a nature and degree that, having regard to the circumstances in which the person acquired the property and the extent of the information

<sup>106</sup> Section 32 of the *Larceny Act 1916*.

<sup>107</sup> Section 6 replaces the old offences of obtaining by false pretences, larceny and embezzlement.

<sup>108</sup> *Attorney General v Oldridge* [2000] IESC 29, [2000] 4 IR 593, at paragraphs 18 and 24.

then available to him or her, its disregard involves culpability of a high degree.”

- 11.92 The restriction of this definition to Part 3 of the Act, which relates to handling and possessing stolen property, gives rise to a strong implication that recklessness was not intended by the Oireachtas to extend to the fraud and theft offences in Part 2.
- 11.93 It also does not appear that recklessness could be implied by any application of the presumption of *mens rea*. That doctrine applies to serious offences that, on their face, lack a fault element. Although the 2001 Act’s fraud offences are quite noncommittal with respect to fault elements, save the explicit reference to intention to cause a gain or loss, it is clear that none of the offences in the 2001 Act could plausibly be interpreted as strict liability offences. Any interpretation of “good faith” would seem to rule that possibility out.
- 11.94 The only express fault element on the face of the 2001 Act offences is the ulterior intention of the offence, however, and not the fault elements that attach to other elements. As argued above, depending on how dishonesty is parsed it could also suggest a fault element of knowledge or highly culpable recklessness attaching to acting without a claim of right.
- 11.95 So, while it is clear that the presumption of *mens rea* applies to the fraud offences considered, it is not clear that it can be used to impute a *recklessness* standard specifically in this case. The closest authority to this is a decision of the Court of Appeal of Victoria in *Afford*.<sup>109</sup> This case concerned a customs offence. Originally, this offence had been provided for in its own Act<sup>110</sup> and it subsequently had chapter 2 of the *Criminal Code Act 1995* applied to it, which imputed a recklessness standard.
- 11.96 The original offences under the Customs Act did not have *mens rea* components, and these were read in by the High Court.<sup>111</sup> The element read in in this case was knowledge, but one judge suggested that knowledge could be inferred from probability or likelihood.<sup>112</sup> This interpretation was subsequently seized upon in *Kural v R*.<sup>113</sup>
- 11.97 This definition was applied in further cases, but it became problematic in *Saengsai-Or*<sup>114</sup> as, by this point, the criminal code had been applied to the offences and the blurred distinction between knowledge and recklessness in the *Kural* definition. Bell J affirmed that the definition in *Kural* was concerned solely with intention, and rejected the view that

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<sup>109</sup> *Steven Lakamu Siosua Afford v R* [2016] VSCA 56. See *Kural v R* [1987] HCA 16, (1987) 162 CLR 502

<sup>110</sup> *Customs Act 1901 (Cth)*.

<sup>111</sup> *He Kaw Teh v R* [1985] HCA 43, (1985) 157 CLR 523.

<sup>112</sup> *Ibid.* at 568 and 570 (Brennan J).

<sup>113</sup> *R v Narongchai Saengsai-Or* (1987) 162 CLR 502.

<sup>114</sup> (2004) 61 NSWLR 135.



the statutory recklessness test in the criminal code could substitute that definition, notwithstanding *Kural's* probabilistic overtones. It was stressed that proof of intention (in the *Kural* sense) went beyond proof of recklessness (in the Criminal Code sense), which sentiment was echoed in later cases.<sup>115</sup>

11.98 In its most recent consideration in *Afford*, the Court of Appeal of Victoria took the view that the *Kural* definition effectively stood apart from the Criminal Code. For present purposes, it suffices to note that this jurisprudence of the Australian courts is an example of a court almost reading in a requirement of recklessness through the presumption of *mens rea*. The later cases in the series, however, make clear that what was read in was a species of intention; specifically, a common law species of intention. There would ultimately seem to be little support for a judicial willingness to infer recklessness using the presumption of *mens rea*. The jurisprudence demonstrates that even where judges apply a standard that may bear resemblance to recklessness, it will nevertheless be characterised as a species of intention.

11.99 It is also worth stressing that in the reported judgments in Ireland that consider the issue it has been consistently held that the presumption was rebutted and the relevant offence was one of strict or absolute liability.<sup>116</sup> Thus, it seems that the bar to be met in order to satisfy the presumption is a very high one, and it is unlikely to be satisfied in a case where an offence already seems to have some substantial *mens rea* components (as the fraud offences considered above do).

11.100 In the final analysis, therefore, it seems that recklessness cannot be plausibly read in to the 2001 Act's fraud offences as they currently stand. The remainder of this chapter will consider how recklessness has been interpreted and applied in the Irish courts, and whether this should be extended to the 2001 Act's offences.

## C. Recklessness in Irish Criminal Law

11.101 There are at least two possible definitions of recklessness that may be endorsed by the criminal law: subjective recklessness and objective recklessness. Recklessness in law refers to advertence to risk. An approach of subjective recklessness requires it to be proved that the accused actually adverted to the risk. An approach of objective recklessness merely requires that the accused ought to have adverted to the risk (ie, it was unreasonable in the circumstances that they did not advert to the risk).

<sup>115</sup> *Cao* (2006) 65 NSWLR 552.

<sup>116</sup> *Maguire v Shannon Regional Fisheries Board* [1994] IEHC 4, [1994] 3 IR 580, *Coleman v Ireland* [2004] IEHC 288 (though this case has to be considered in light of the later *CC v Ireland* case, which came to the opposite conclusion on section 1(1) of the *Criminal Law (Amendment) Act 1935*), *Minister for the Environment v Leneghan* [2009] IEHC 226, [2009] 3 IR 727 (though the court did appear to consider that it could read subjective recklessness into an offence through the presumption of *mens rea* at paragraph 20), *Director of Corporate Enforcement v Gannon* [2002] 4 IR 439, *Reilly v Pattwell* [2008] IEHC 446.

- 11.102 The leading case on recklessness is *The People (DPP) v Murray*.<sup>117</sup> This case set out a subjective standard of recklessness, which is defined as the taking of a “substantial and unjustified risk”.<sup>118</sup> The relevant aspects of the *Murray* case concerned the killing of a member of the Garda Síochána in the course of their duty. The DPP charged the defendants with capital murder pursuant to section 1 of the *Criminal Justice Act 1964*.
- 11.103 The Supreme Court in *Murray* was confronted with the issue as to what mental state(s) would be sufficient to satisfy the offence in section 1 of the 1964 Act; specifically, the level of knowledge that would be required to attach to the circumstance element of the offence that the victim of the killing be a member of the Garda Síochána. Ultimately, the Court concluded that this circumstance element of the crime could not be strict and it would have to have some fault element attach to it, citing to the “presumption of *mens rea*” in criminal offences,<sup>119</sup> which principle maintains that serious offences must be presumed to contain fault elements unless the contrary intention is clear.
- 11.104 In the course of considering section 1 of the 1964 Act, the Court made some statements of more general application with regard to the standard of criminal recklessness in Irish law. Walsh J identified two competing possibilities:

“Recklessness may be found either by applying a subjective test as where there has been a conscious taking of an unjustified risk of which the accused actually knew, which imports foresight, or by applying an objective test as where there has been a conscious taking of an unjustified risk of which the accused did not actually know but of which he ought to have been aware.”<sup>120</sup>

- 11.105 The question can be considered as one of actual, as opposed to constructive, awareness. Must the accused actually advert to the risk, or can a failure to advert to a risk be culpable where it is reasonable to expect that the accused should have had regard to that risk?<sup>121</sup>
- 11.106 Henchy J favoured the formulation of recklessness adopted in the US Model Penal Code:

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that,

<sup>117</sup> [1977] IR 360.

<sup>118</sup> *Ibid*, at 403.

<sup>119</sup> *Ibid*, at 399.

<sup>120</sup> *Ibid*, at 386.

<sup>121</sup> There is an element of dereliction of duty or obligation involved in the objective approach that the subjective approach does not share. The objective and subjective approaches have this in common: the accused must fall below some normative standard (she must fail some “ought” test). The question is which standard: a test of “adverted to a risk and ought not to have taken it” (subjectivism) or “failed to advert to a risk, but should have” (objectivism). Thus, subjective risk punishes the individual for their faulty actions, and objective risk punishes the individual for a kind of faulty omission.

considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."<sup>122</sup>

- 11.107 The stress placed on conscious disregard of a substantial and unjustifiable risk marks this definition as a subjective one. This definition gained traction after the *Murray* case and, notwithstanding some initial confusion,<sup>123</sup> it is clearly established as a general one in Irish law.<sup>124</sup>
- 11.108 More recently, in *The People (DPP) v Cagney and McGrath*<sup>125</sup> the Supreme Court reaffirmed this commitment to the subjective standard drawn from the Model Penal Code. This case concerned two defendants charged with reckless endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997*. The Supreme Court reaffirmed that the test for recklessness was advertence to a "substantial and unjustifiable" risk. The actuality of advertence was underscored by the Court here; the trial judge failed to draw the jury's attention to the necessity that the accused advert to the risk and Hardiman J considered that this was a "grave defect" in the trial.<sup>126</sup>
- 11.109 *Cagney and McGrath* was an endorsement of a test that is unambiguously subjective-leaning, which subsequent cases have continued to follow.<sup>127</sup> The test is not entirely subjective; it has an objective component insofar as whether a risk can be considered "unjustifiable" must be determined by reference to a community standard, not the accused's own assessment. In considering whether or not to expand the definition of the fraud offences considered in this chapter to encompass recklessness, it is important to bear in mind that recklessness in Ireland has this subjective hue.
- 11.110 Recklessness, as is clear from the analysis in section 2, is not applicable as a fault element in fraud offences under the 2001 Act. Recklessness is, however, an increasingly common fault element in Irish criminal law; it applies to many offences under the *Non-Fatal Offences Against the Person Act 1997*, including assault,<sup>128</sup> assault causing harm,<sup>129</sup> assault causing serious harm,<sup>130</sup> as well as the offence of damaging property under the *Criminal*

<sup>122</sup> US Model Penal Code, s. 2.02(2)(c); cited in *People (DPP) v Murray* [1977] IR 360, at 403.

<sup>123</sup> Different members of the court gave different judgments. Although most of these settled on subjective definitions of recklessness, they were not necessarily easy to square with one another. See McAlesse, "Just What Is Recklessness?" (1981) 4 DULJ 29.

<sup>124</sup> It was not immediately clear whether the definition was restricted to the crime of capital murder. It is clear now that it is not: *Clifford v DPP* [2008] IEHC 322, at paragraph 14.

<sup>125</sup> [2008] 2 IR 111.

<sup>126</sup> *Ibid*, at 131.

<sup>127</sup> *People (DPP) v C O'R* [2016] IESC 64, at paragraph 45; *DPP v TV* [2016] IECA 320, at paragraph 32.

<sup>128</sup> Section 2 of the *Non-Fatal Offences Against the Person Act 1997*.

<sup>129</sup> Section 3 of the *Non-Fatal Offences Against the Person Act 1997*.

<sup>130</sup> Section 4 of the *Non-Fatal Offences Against the Person Act 1997*.

*Damage Act 1991*<sup>131</sup> and the crime of rape.<sup>132</sup> Subjective recklessness has the virtue of endorsing the subjective approach to the determination of criminal liability generally favoured by Irish criminal law, without the restriction of requiring the prosecution to show “absolute certainty” that the accused was defrauding another. It is therefore arguable that fraud offences should also be reviewed in light of the increasing use of subjective recklessness in serious criminal offences.

## 1. Recklessness as an Element in Civil Fraud

11.111 Recklessness has been endorsed as a fault element in fraud cases in Ireland, albeit not statutory fraud offences. In *McAleenan v AIG Europe*<sup>133</sup> Finlay Geoghegan J in the High Court described the elements of fraudulent misrepresentation in a context where an insurance policy was alleged to have been negated by fraudulent statements. In the course of her judgment, Finlay Geoghegan J noted that “[t]he meaning of fraud in an action for deceit is well settled and derives from the decision of the House of Lords in *Derry v Peek* [...]”<sup>134</sup> She quoted from this latter judgment the following:

“First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.”<sup>135</sup>

11.112 This citation to *Derry v Peek* must be taken with a caveat, however. The meaning of recklessness in the quote above is not entirely consistent with the meaning of that term expounded in *Murphy*. Finlay Geoghegan J went on to hold that:

“It is clear that ‘careless’ for this purpose is not the same as when used in relation to the tort of negligence. The carelessness must be something greater to constitute recklessness for the purposes of fraud.... [A] statement may be considered as made recklessly where the circumstances are such that the Court considers the maker can have no real belief in the truth of what he states. It appears to require an objective consideration by the Court as to whether the circumstances in which the plaintiff [acted] were so careless as to whether the statements were true or false that the Court must conclude that she could have had no real belief in the truth of the statements contained in the Proposal Form.”<sup>136</sup>

<sup>131</sup> Section 2 of the *Criminal Damage Act 1991*.

<sup>132</sup> Section 2 of the *Criminal Law (Rape) Act 1981*.

<sup>133</sup> [2010] IEHC 128.

<sup>134</sup> [2010] IEHC 128, at paragraph 112.

<sup>135</sup> (1889) 14 Apat Cas. 337, at 374. Emphasis added.

<sup>136</sup> [2010] IEHC 128, at paragraph 123.

11.113 Although “no real belief” could have been construed as a subjectively inclined standard, it must be read in the context of a clear statement to the effect that the Court’s assessment should be objective. In other words, the circumstances surrounding the making of the statement point to a conclusion that there was no real belief, rather than looking to the mind of the maker of the statement and inquiring as to their actual belief. This is a substantially different inquiry from that made in a criminal law context but serves to show that recklessness (at least semantically) is not an alien concept in the context of fraud cases.

## 2. Recklessness in the UK *Theft Act 1968*

11.114 It is also notable that the *UK Theft Act 1968* (since repealed in relevant part by the *Fraud Act 2006*) included a recklessness standard in some fraud offences. In section 15(4) it provided that:

“For purposes of this section ‘deception’ means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.”

11.115 It is not, therefore, an entirely new break from the past to include recklessness in statutory fraud offences either. However, this point must be taken with the significant caveat that “recklessness” has a different meaning in the English courts than that which it bears in the Irish courts. As recounted above, the Irish courts adopted a subjective understanding of recklessness early in their development of the jurisprudence on this topic. The English courts, by comparison, initially adopted a subjective standard<sup>137</sup> but moved towards an objective standard later.<sup>138</sup> This objective standard then proved to require harsh applications,<sup>139</sup> and was ultimately overruled.<sup>140</sup>

11.116 Thus, while there is ultimately greater alignment between the Irish and English courts on this point now, at the time the *Theft Act 1968* was enacted the definition would have been taken to be objective.

11.117 It is also worth pointing out that this is only a small element of the offence for which recklessness might suffice. It seems that for the offence in section 15 (obtaining property by deception) it would suffice for the defendant to be reckless as to the truth or falsity of their representations to the complainant. They would still have had to manifest intentional mental states for both the dishonesty aspect of the offence and the deprivation of the owner.

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<sup>137</sup> *R v Cunningham* [1957] 2 QB 396.

<sup>138</sup> *R v Caldwell* [1982] AC 34.

<sup>139</sup> *Elliott v C* [1983] 1 WLR 939.

<sup>140</sup> *R v G & Anor* [2003] 4 All ER 765.

### 3. Effect of Including Recklessness in Fraud Offences

11.118 Inserting a standard of recklessness into the fraud offences, outlined above, widens the range of behaviour that can result in liability under the various offences. This raises a possible concern that the moral culpability of the accused is such that it would be inappropriate or improper to criminalise this behaviour. Husak posits two principles with regard to the criminalisation of conduct. These are:

- (1) The non-trivial harm or evil constraint: "Criminal liability may not be imposed unless statutes are designed to prohibit non-trivial harm or evil."
- (2) The wrongfulness constraint: "Criminal liability may not be imposed unless the defendant's conduct is (in some sense) wrongful."<sup>141</sup>

11.119 Husak also argues that the burden on justifying the creation of criminal liability lies with those proposing to enact a criminal offence.<sup>142</sup> The typical justification for enacting criminal offences or extending liability focuses upon the harm done to the victim. John Stuart Mill first argued that the so-called "harm principle" should be the (sole) basis for criminalisation. As he argued: "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."<sup>143</sup> However, the harm principle necessarily focuses on the harm to the victim and the extent of that harm. Under consideration presently is the varying subjective fault elements that may be implicated in a criminal act that leads to the harm. If a person deceives another (and implicitly harms the victim through an impact to their autonomy<sup>144</sup> or through a loss that the deception brings about), there is no distinction in terms of harm caused to that victim whether the perpetrator intended to deceive or was reckless in carrying out an act of deception. In both cases, the harm is identical but the culpability of the perpetrator in the latter case may be less than in the former. For this reason, justification of extending liability to reckless acts cannot be found in looking to the harm principle.

11.120 The only way in which extension of liability to reckless acts of fraud can be justified is by examining each case of fraud and addressing practically what the conduct of reckless fraud actually involves for each offence. This analysis will proceed by addressing each of the fraud offences considered above and inserting a recklessness fault element in order to determine whether its insertion may lead to illegitimacy

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<sup>141</sup> Husak, *Overcriminalization* (OUP 2008) at 66.

<sup>142</sup> *Ibid.* at 100.

<sup>143</sup> Mill, *On Liberty* (1859).

<sup>144</sup> See Feinberg, *Harm to Others* (OUP 1984) at 35.

**(a) Making gain or causing loss by deception**

11.121 The first fraud offence that will be addressed in terms of its compatibility with recklessness is making gain or causing loss by deception under section 6. It will be recalled that this offence contains the following elements:

- Dishonesty;
- With intention of making a gain or causing a loss;
- Deception;
- Induces another to do or refrain from doing an act.

11.122 The fault element that corresponds with the conduct elements of inducing an act and deception is intention, for the reasons given above. Where intention is the necessary fault element, as it is presently, the following example may be illuminating:

A wishes to sell a painting to B and seeks to convince B that the painting is by Jack Butler Yeats where in reality it is by A's sister. B believes the statement and buys the painting for an enormous sum of money.

11.123 In the above, each element of section 6 is present: A does not have a claim of right made in good faith to the gain he is seeking to make, he intends to make an inflated sum of money and cause B to lose this money, he deceives by creating the false impression that the painting is by Jack Butler Yeats and because of this deception, B parts with his money. Here, plainly, A has intended to deceive B for if there was no deception (no false impression created), the gain could not be made.

11.124 Altering the example slightly to illustrate the potential use of recklessness, consider the following:

A wishes to sell his painting to B and seeks to convince B that the painting is by Jack Butler Yeats. Although A was told by his father that the painting was by Jack Butler Yeats, he is aware that his father knows nothing of art and has been told by others that the painting looks nothing like the work of Jack Butler Yeats. Despite this, he convinces B that the work is by Jack Butler Yeats and B pays him an enormous sum for the painting.

11.125 In the above example, A does not intend to deceive B in a strict sense. Strictly, he cannot be certain that he is deceiving B at all and therefore cannot be said to intend deception.<sup>145</sup> If he had an honest belief that the painting was by Jack Butler Yeats, he would have a claim of right made in good faith against the gain that he made by selling the painting and there would be no liability under section 6. However, A is aware that there is a substantial

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<sup>145</sup> For the purposes of this example, oblique intention is not engaged because it cannot be said that A is aware that deception is a "highly likely" result of his actions because, again, A does not know if what he is saying is actually false, just that there is a substantial risk of it being false.

risk that his statements are false and therefore that B is being deceived. He adverts to that risk and takes it anyway, continuing to seek to convince B that the painting is by Jack Butler Yeats. Where the risk is substantial and unjustifiable, as it is here, and is consciously adverted to and taken anyway, subjective recklessness is present and therefore it cannot be said that A has a claim of right made in good faith.

11.126 As mentioned above, the definition of “deception” presents an additional hurdle in the context of this offence. It is clear that as that term is defined in section 2(2) of the 2001 Act, it requires some level of knowledge of the falsity of the claim or representation being made. This is difficult to reconcile with recklessness. It is conceptually possible to envisage a situation where an accused is aware of the falsity of his claims but is reckless as to who he says them to and whether they are believed and acted upon. It is likely, therefore, that if the fault elements of section 6 were to be expanded to include reckless or uncaring behaviour, the definition in section 2(2) would also require some adaptation.

11.127 Therefore, presently, the law states that only the first example, where A knows what he is saying is creating a false impression and has the intention to do so. In the second case, A could argue that he had reasons to believe the painting was by Jack Butler Yeats and therefore was not aware of whether he was deceiving B. The fact of his awareness of a substantial and unjustifiable risk that it was not by Jack Butler Yeats would not be sufficient to convict him. This is unduly generous to A, whose conduct here is sufficiently morally culpable that it ought to be covered by section 6.

#### **(b) Obtaining services by deception**

11.128 This is a similar offence to section 6 and there are a number of overlaps between section 6 and 7. The elements of section 7 of the 2001 Act are:

- Dishonesty;
- Intention of making a gain or causing a loss;
- Deception;
- Obtains services.

11.129 An example of behaviour criminalised under this section is:

A fills out a loan application with information he knows to be false in order to induce a lending institution, L, to give him a loan. L subsequently extends credit to A on the basis of the falsified information and A spends the borrowed money with no intention of repaying it.

11.130 Here A has intended to deceive L and has been successful in doing so. A has an intention of making a gain through the expenditure of money borrowed by deception (and causing a loss to L). A has no claim of right made in good faith over the services obtained. In this case, services are actually obtained because making a loan is included in the definition of “services.”



11.131 Amending the example to transform it into a case of recklessness, consider the following:

A fills out a loan application with information that he is unsure of, but takes no effort to verify. Despite his lack of certainty, he proceeds with the loan application and is given a loan by L. It subsequently transpires that A's information was false and he is unable to repay the borrowed money.

11.132 Here, the considerations are the same as the above discussion in relation to section 6. The risk taken in the above example is that the information given is false and that information is conveyed nonetheless. Here L is deceived but A did not know whether he would indeed be demoted and so cannot be said to have intended to deceive L, since there was a chance the information would not be false. However, the fact of a substantial and unjustifiable risk that the lending institution is being deceived, the conscious advertence to that risk and the taking of that risk are arguably sufficient justifications to impose criminal liability. Similarly, to the example in relation to section 6, the above example concerns a situation where A knows information (a possible demotion) which could result in L being deceived and chooses not to divulge this information and act as if the information does not exist. This creates a false impression and is sufficiently wrongful to justify criminal liability.

**(c) Unlawfully operating a computer, or causing one to be operated**

11.133 Given how section 9 is framed, it is difficult to conceive of a case in which a person is reckless with regard to their operation of a computer or their causing a computer to be operated. In almost every case, this will be intentional and so it is proposed that no example is given here.<sup>146</sup> Furthermore, this implies an argument that, in a case where an accused can characterise the operation of a computer as reckless because, somehow, they took a risk with the intention of making a gain (and being dishonest about that gain) that they would cause the operation of a computer or computers, there is an insufficient level of culpability. It is submitted that a person must intend to operate a computer or cause a computer to be operated if the State is to impose criminal liability upon them for the unlawful operation of a computer.

**(d) Destroy, deface, conceal or falsify any account or document made or required for any accounting purpose**

11.134 This offence has the following elements:

- Dishonesty;
- Intention to make gain or cause loss;

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<sup>146</sup> It is difficult to conceptualise how one could recklessly operate a computer. Ordinarily, recklessness as to a circumstance will require that there is some action, reasonably proximate in character to the action performed, that might be engaged in by the accused. There are no obvious candidates for actions that are sufficiently like operating a computer that might satisfy this.

- Destroy, deface, conceal or falsify any account or document made for accounting purpose.

11.135 An example of this offence being committed intentionally:

A, a pharmacist, fills out prescription repayment forms, falsifying the details of number of patients in order to inflate the amount her pharmacy is owed by the HSE. She sends these forms to the HSE with the expectation that they will pay her the amount claimed.

11.136 This example is a variation of the English case of *R v Atkinson*,<sup>147</sup> which is considered above.<sup>148</sup> In this first example, A has falsified the documents deliberately and so is plainly liable under section 10(1)(a). There is no requirement under section 10(1)(a) that an actual gain is made, merely the falsification of an accounting document with an intention to make a gain. There is an intention to make a gain (and cause the State a loss) and the falsification is deliberate and intentional. A more difficult case is that which is closer to the actual facts of *Atkinson*, which involves recklessness:

A, a pharmacist, fills out prescription repayment forms while watching television and interacting with her daughters. The thought crosses her mind that she might be making a few errors, but she does not review the forms later. She fills a number of them out incorrectly, such that the amount she is owed by the HSE is higher than the true amount she is owed. She sends these forms to the HSE with the expectation that they will pay her the amount claimed.

11.137 A in this case has acted recklessly. Unlike in *Atkinson*, it cannot be said that A knew that it was “likely” that she was falsifying the documents but she was aware of a risk that filling out the documents while distracted would lead to her falsifying the documents. This is a difficult case, because the intention to make a gain could be characterised in two different ways: first, A clearly intended to make a gain because payment is the sole purpose of the prescription forms, she will “get what she has not” in money, to use the phrasing of the definition of “gain” in the 2001 Act. Secondly, while A may have claimed more than she was in fact entitled to, she did not intend for this result and this is how “gain” ought to be construed. This is subject to interpretation. Another difficult aspect of this problem is A’s dishonesty. It may be argued that A had a claim of right made in good faith for the amount claimed since she honestly believed she had a claim of right over the repayments in her prescription forms. However, considering the substantial and unjustifiable risk that she adverted to that she may fill out the forms incorrectly and therefore claim more than she

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<sup>147</sup> [2004] Crim LR 226.

<sup>148</sup> A case with factually similar facts seems to also have occurred in Ireland: Roche, “Pharmacist (71) faces 170 charges of deception and false accounting” *The Irish Times* 21 September 2016. Available at: <https://www.irishtimes.com/news/crime-and-law/pharmacist-71-faces-170-charges-of-deception-and-false-accounting-1.2799377>.

was entitled to and she took that risk, arguably there is an absence of “good faith” in this case.

**(e) Destroy, deface, or conceal any valuable security**

11.138 This offence concerns the destruction, defacement or concealment of any valuable security. This offence contains the following elements:

- Dishonesty;
- Intention to make gain or cause loss;
- Destroy, deface or conceal any valuable security.

11.139 An example of this offence being carried out intentionally is the following:

A burns B’s will because under its terms he is to inherit nothing, and if B dies intestate he is owed a share of the estate.

11.140 In this case, A intentionally destroys a will, knowing that he has no claim of right over the share of the estate that he secures by the destruction and intends to make a gain through the destruction. A case of recklessness is the following:

A, having been removed from B’s will, seeks revenge on B by destroying his property and sets fire to a stack of papers in B’s office, not knowing that the will is in the stack of papers. A is aware that the will may be in the stack of papers but does not go through it to discover whether it is or not.

In this case, A intends to cause B a loss rather than make a gain (the loss of whatever value is in the stack of papers) and is conscious of the risk that he is destroying B’s will and takes that risk nonetheless. Clearly, A is liable for criminal damage under section 2 of the Criminal Damage Act 1991 but not under section 11 of the 2001 Act. This is because it is not his specific intention to destroy the particular will, but to harm B more generally but did give thought to the possibility that the will was being destroyed. As well as this, because the intention is to cause a loss without also intending a corresponding gain for anyone else, it is more difficult to say that A is acting “dishonestly”. However, A knows he has no claim of right over the will, and that he has no right to destroy any of B’s property.

## D. Conclusions and Recommendations

11.141 There are broadly two ways in which the offences could be reformed. The relevant sections of the 2001 Act could be repealed and replaced with a new fraud act, as occurred in England with the replacement of the relevant offences under the *Theft Act 1968* with the *Fraud Act 2006*. Alternatively, new provisions could be inserted into the relevant sections of the 2001 Act to expand the fault elements of its fraud offences.

11.142 One approach to reforming this area of law would be to repeal the provisions of the 2001 Act discussed above, and replace them with entirely new fraud offences. The Criminal Law

Codification Advisory Committee (CLCAC) has already recommended an approach along these lines.<sup>149</sup>

11.143 The CLCAC insert recklessness into the fraud offences considered in their Draft Code but also reform the law in other ways. For example, sections 6 and 7 are consolidated and transformed into the following offence of “deceiving with intent”:

“(1) A person commits the offence of deceiving with intent if he or she intentionally, knowingly or recklessly—

(a) induces another by any deception to do or refrain from doing an act, or

(b) obtains services from another by any deception,

with the intention of making a gain for himself or herself or another, or of causing loss to another.

(2) A person does not commit an offence under this Head if he or she acts with a claim of right made in good faith.”<sup>150</sup>

11.144 Similarly, the CLCAC consolidate section 10 and 11 into a new offence of “fraudulent practice” which is formulated as follows:

“(1) A person commits the offence of fraudulent practice if he or she intentionally, knowingly or recklessly—

(a) destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose,

(b) fails to make or complete any account or any such document,

(c) in furnishing information for any purpose, produces or makes use of any account, or any such document, which he or she knows is or may be misleading, false or deceptive in a material particular,

(d) destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office, or

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<sup>149</sup> CLCAC, *Draft Code and Commentary*, at 160.

<sup>150</sup> *Ibid*, at 160.

(e) by any deception procures the execution of a valuable security,

with the intention of making a gain for himself or herself or another, or of causing loss to another.

(2) A person does not commit an offence under this Head if he or she acts with a claim of right made in good faith.”<sup>151</sup>

11.145 These consolidations have a number of common features. First, “dishonesty” is removed from the substantive offence and placed as a defence in a sub paragraph. As the 2001 Act currently stands, the prosecution must prove all requisite elements of the offence, including dishonesty (the absence of a claim of right made in good faith). Where this element is taken from the actual offence and placed as a defence, the defendant must now prove the presence of a claim of right made in good faith. This effectively exempts the prosecution from having to prove an absence of good faith in every case.

11.146 The CLCAC also insert express fault elements for each offence. The formula chosen to express these fault elements is “intentionally, knowingly or recklessly.” The reason for this is that, as noted, the CLCAC regard recklessness as an appropriate standard of culpability for most offences. As well as this, they view a conflict between dishonesty and recklessness where both of these elements are present within the substantive offence. They argue:

“If the reference to ‘dishonestly’ were to be left in as part of an offence definition, the operation of the ‘read-in’ rule would in effect require the prosecution to prove that the defendant consciously disregarded a substantial and unjustifiable risk that he was acting dishonestly – i.e. without a claim of right made in good faith. Such a result would corrupt the meaning of the dishonesty requirement as provided for under the 2001 Act, where no such fault element of recklessness applies.”<sup>152</sup>

11.147 It is certainly the case that reckless conduct is not compatible with honest conduct, since the conscious taking of a substantial and unjustified risk of wrongdoing is not consistent with “good faith” in the dishonesty definition. This can obviously also be said of intentional or knowing wrongdoing. However, it must be recognised that the difficulties the CLCAC raises with this approach are themselves creations of other aspects of the CLCAC’s general approach. The difficulty with this is that it becomes difficult to take the CLCAC reforms piecemeal; given the very broad nature of that group’s proposed reforms, and the degree to which those reforms interlock with one another, it becomes difficult to isolate a self-contained model for reform of, say, fraud offences under the 2001 Act.

<sup>151</sup> *Ibid*, at 164.

<sup>152</sup> *Ibid*, at 144.

11.148 The benefit of the CLCAC's approach is that recklessness is incorporated into these offences along with other reforms that reduce the number of criminal offences. Sections 6, 7, 10 and 11 are reduced to two statutory offences. This could result in a simplification of the criminal law in this area and facilitate the understanding of the offences that amount to statutory fraud. As well as this, the CLCAC's approach would reduce the number of overlapping crimes, a phenomenon that Husak argues is objectionable.<sup>153</sup> The reasons he offers relate to the possibility of "charge stacking" whereby a person is charged with multiple offences where one offence is seemingly committed. This results in offenders facing lengthier sentences than if they had just been charged with one offence. However, there is no evidence to suggest sections 6 and 7 or 10 and 11 have been used by prosecutors in this manner and, in any event, sections 6 and 7 share a possible maximum sentence, as do sections 10 and 11.

11.149 In the final analysis, the Commission considers that while there may be merit to the CLCAC's approach, it goes further than the scope of the current Report and it is difficult to extricate piecemeal recommendations from the CLCAC's overall vision for a more radical revision of Irish criminal law. Accordingly, the Commission suggests a less wide-ranging suite of reforms below.

11.150 A less radical reform than the wholesale replacement discussed above would be to amend specific provisions of the 2001 Act. This prompts the further question as to the form such amendments might take. The most trivial and least invasive amendment would be to insert subsections into each of the sections of the 2001 Act discussed above to clarify that the relevant offence may be performed intentionally, knowingly or recklessly. Where possible, this approach is taken.

11.151 There is a preliminary difficulty with this more piecemeal approach, however. As has been demonstrated earlier in this chapter, the fraud offences of the 2001 Act are quite complex and they each contain a variety of elements to which fault elements may attach. It is easiest to relay this complexity by way of a familiar example. Consider section 6(1) of the 2001 Act as currently enacted:

"A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence."

11.152 There is an element of the offence here that textually requires intention: the ulterior motive of making a gain or causing a loss. Reform cannot, therefore, be so simple as to say that the offence in section 6 *as a whole* may be committed intentionally or recklessly. As explained above, intention attaches to the element of making a gain or causing a loss, but the Act is silent as to other elements of the offence, such as the deceptive act and the

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<sup>153</sup> Husak, *Overcriminalization* (OUP 2008), at 37-38.

requirement to act dishonestly.<sup>154</sup> Each of these elements must have a fault element attached to it. How the fault element of these act requirements might be clarified is explored below. Once the analysis of these elements of section 6 is completed, the remainder of this section will investigate distinct elements of the other fraud offences considered above and identify possible amendments to the relevant sections.

### (a) Deception

11.153 Given that deception is an element in more than one offence, and it is defined in section 2(2) of the Act, the most parsimonious approach to clarifying its fault element would be to insert an amendment to that section. Recall that section 2(2) reads, in relevant part:

“For the purposes of this Act a person deceives if he or she –

(a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind,

(b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or

(c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship, and references to deception shall be construed accordingly.”

11.154 The most simple way to clarify the fault element of deception would be to amend the first sentence of this provision to read “For the purposes of this Act, a person deceives if he or she, *intentionally or recklessly...*”. This clarifies that the fault element for this aspect of the 2001 Act's fraud offences can be either intention or recklessness, and as it prefaces the definition generally, this will apply to all substantive offences under the Act that require this element in their definitions.

11.155 The benefit of this approach as compared to the CLCAC reforms discussed in the preceding section is that this reform is incremental and introduces recklessness expressly without any dramatic change to the existing law. Although larger scale reform has the advantage of solving several codification problems at once, the focus of the Commission's enquiry in this Report is narrower: should recklessness be introduced into specific fraud offences.

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<sup>154</sup> The inducement to act is, of course, the final element of the offence. It seems unlikely that someone would recklessly induce another to act in a certain way. This would require that the perpetrator of the offence identify a risk that the victim would be induced by an action and that the perpetrator nevertheless undertake that action. Inducements, ordinarily, will have a stronger link to motivations than this; it is usually the perpetrator's objective in undertaking a certain action that it will induce the victim to change their position. This suggests that intention will apply here and this is unlikely to require textual specification due to this conclusion flowing from the nature of inducements.

The most minimal means by which this may be achieved is through amendment of the 2001 Act. Other aspects of reform of the 2001 Act fall outside the scope of the present Report.

**R 11.03 The Commission recommends that the definition of “deception” in the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide that for the purposes of that definition “a person deceives if he or she, intentionally or recklessly” engages in the acts subsequently referred to in the 2001 Act.**

**(b) Dishonesty**

11.156 The element of dishonesty applies in all the fraud offences considered above. Recall that it is defined as acting ‘without a claim of right made in good faith’. The discussion above demonstrates the difficulty of classifying this as a fault element, at least if the formula is taken as a whole. Acting without a claim of right requires no fault element, and good faith could plausibly be analogised with knowledge given that good faith would require a belief to be grounded on some reasonable basis.

11.157 As a result of this difficulty in characterising dishonesty as purely a conduct or fault element of itself, it seems better to leave the current definition as-is. There may be some merit to the CLCAC’s classification of this element as a *defence* rather than an element of the offence, but the Commission does not consider that this Report is the proper place to reconsider this more significant reform of the 2001 Act offences.

**R 11.04 The Commission recommends that the definition of dishonesty in the *Criminal Law (Theft and Fraud Offences) Act 2001* as acting “without a claim of right made in good faith” should be retained.**

**(c) Section 9 – Unlawful Use of a Computer**

11.158 This is a very broad offence, as described in the discussion of its elements above. It consists in merely operating a computer without a claim of right, with the intention of making a gain or causing a loss. The only element here that could have its fault element clarified in a substantial way is the requirement of operating a computer. However, it is not clear how this could be done in any way less than intentionally. One could be reckless as to one’s claim of right to exercise the computer, certainly, but this would go to the dishonesty question, not the operation of the computer.

**R 11.05 The Commission recommends that the offence of unlawful use of a computer in section 9 of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be retained in its current form.**

**(d) Section 10 – False Accounting**

11.159 The offences in section 10 all contain result elements that would benefit from having clarity brought to their fault elements. The offence in section 10(1)(a) is committed when



a document made for an accounting purpose is destroyed, defaced, concealed or falsified. The offence in section 10(1)(b) is committed when an accounting document is not made or completed. The offence in section 10(1)(c) is committed when an accounting document is produced that contains false or misleading information, and this information is furnished to the victim.

11.160 Section 10(1)(a) currently reads as follows:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—

(a) destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose...”

11.161 As described above, neither the element of dishonesty nor the element of intending to cause a gain or loss are good candidates for reform so far as fault elements of fraud offences are concerned. This leaves the conduct described in subsection (a). There is no textual fault element for this part of the offence. This could be remedied through the addition of the phrase ‘intentionally or recklessly’ at the beginning of the subsection. The amended subsection (a) would therefore read: ‘*intentionally or recklessly* destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose’.

11.162 Similar logic can then be applied to subsections (b) and (c), which deal with failing to complete certain documents and making use of documents that are known to contain false or misleading details, but that are not themselves produced by the individual relying on them. Each of these subsections can be prefaced with the phrase ‘intentionally or recklessly’ to clarify the fault elements applicable to each element:

“(b) intentionally or recklessly fails to make or complete any account or any such document, or

(c) in furnishing information for any purpose intentionally or recklessly produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.”

**R 11.06 The Commission recommends that the definition of the conduct element of the offences in section 10(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide as follows:**

**“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—**

**(a) intentionally or recklessly destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose**

- (b) intentionally or recklessly fails to make or complete any account or any such document, or
- (c) in furnishing information for any purpose intentionally or recklessly produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.”

**(e) Section 11 – Suppression, etc of Documents**

11.163 The offences in section 11 both contain result elements. In the case of section 11(1), a valuable security, will, or testamentary document must be destroyed. In the case of section 11(2) a valuable security must be procured by a deception, which mirrors the requirements of sections 6 and 7. The first of these offences reads as follows:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.”

11.164 As with similar offences discussed above, this offence can be amended relatively simply through the introduction of the phrase “intentionally or recklessly” in the appropriate place:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, *intentionally or recklessly* destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.”

11.165 Paragraph (2)(a) creates a similar offence:

“A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception procures the execution of a valuable security is guilty of an offence.”

11.166 As with the element of “inducement” considered above in the context of section 6, it is not clear that the procurement of a valuable security is something that could be done less than intentionally. It is difficult to envisage a situation in which a person envisages the possibility that a valuable security may be created through their actions, and proceeds anyway without necessarily making the procurement of that security their objective. Because of this, the Commission does not recommend that the offence in section 11(2)(a) requires any amendment.

**R 11.07 The Commission recommends that the definition of the conduct element of the offence in section 11(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be**

**amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide as follows:**

**A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, *intentionally or recklessly* destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.**



## CHAPTER 12

# RECKLESS TRADING

### A. Introduction

12.01 Currently, there is no criminal offence of reckless trading, despite the potential for reckless risk-taking in companies to have detrimental effects on creditors, and ultimately the economy and the stability of the financial system. Numerous scandals caused by corporate bodies have heightened public awareness of the dangers of corporate crime.<sup>1</sup> The events of the financial crisis highlighted the potential for harm that can result from excessive risk-taking. Various crisis reports cited failures to address risk in the banking sector as a contributing factor to the crisis<sup>2</sup> with the Nyberg report stating that there was a “general denial of the extent of accumulated risk until the very end”.<sup>3</sup> The Report of the Joint Committee into the Banking Crisis provided the following summary of the role of risk in the economic crisis:

“One description of this recent crisis was that it was a systemic misjudgement of risk; that those in significant roles in Ireland, whether public or private, in their own way got it wrong; that it was a misjudgement of risk on such a scale that it led to the greatest financial failure and ultimate crash in the history of the State”.<sup>4</sup>

12.02 Since the financial crisis, it has become clear that reckless risk-taking by officers of corporate bodies can cause significant harm, and because of the gravity of the potential harm, calls have been made for the criminalisation of reckless trading.<sup>5</sup>

12.03 One danger of criminalising reckless trading is the potential to impede commercial activity. One of the primary functions of the criminal law is to deter certain activity from

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<sup>1</sup> Horan, *Corporate Crime* (Bloomsbury Professional, 2011) at 10.

<sup>2</sup> Regling and Watson, A Preliminary Report on The Sources of Ireland’s Banking Crisis, PUB00168. See also the Honohan Report, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008*, May 2010, PUB00075.

<sup>3</sup> Nyberg Report, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland: Report of the Commission of Investigation into the Banking Sector in Ireland* (2011) at paragraphs 2.11 and 4.94.

<sup>4</sup> Houses of the Oireachtas, *Report of the Joint Committee of Inquiry into the Banking Crisis, Volume 1 Report* (2016) at 3.

<sup>5</sup> See, for example, Office of the Director of Corporate Enforcement *Submission on White Collar Crime* (2010); Open Government Partnership Ireland (Department of Public Expenditure and Reform) *Report of a Consultation with Civil Society Representatives and Citizens on Ireland’s Participation in OGP* (2013). See also, Houses of the Oireachtas Committee of Public Accounts *Interim Report on the Committee’s Examination of Bank Stabilisation Measures* (31/CPAS/008, 2013).

taking place,<sup>6</sup> and a criminal offence for reckless trading has the potential to deter a wide range of commercial risk-taking. However, the law must also facilitate and encourage risk-taking that is necessary, and even valuable, in a modern economy. If entrepreneurial activity and commercial enterprise is to be undertaken and to flourish, the legal system must not inhibit the risk-taking that is essential to the economy.<sup>7</sup> A criminal offence for reckless trading must not deter the beneficial forms of risk-taking which other areas of the law are designed to encourage.

12.04 However, not all forms of risk-taking should be encouraged and certain types of risk-taking should be deterred. The Oireachtas has previously considered reckless trading; however, the legislature decided to confine criminalisation to clear-cut cases of fraud, and that a criminal offence of reckless trading would cause uncertainty for companies and their managers and reduce the desirable forms of risk-taking.<sup>8</sup> The Commission, therefore, is considering whether a narrow category of negative risk-taking should be criminalised. It is important, therefore, to distinguish negative forms of risk-taking from beneficial forms of risk-taking in commercial activity. Arguably, distinguishing the various forms of risk-taking in companies can significantly reduce the potential for uncertainty.

12.05 As mentioned above, reckless trading is not currently a criminal offence; however, company officers can be made civilly liable for the debts of the company under sections 610 and 611 of the *Companies Act 2014*.<sup>9</sup> Although the criminal law and civil law have different aims, the conduct covered in both cases will be similar and there will be some overlap between the civil remedy and any potential offence of reckless trading. The case law and commentary on these civil law provisions can inform a discussion on whether reckless trading should be criminalised.

12.06 The Commission noted in the Issues Paper that “it is essential that the criminal law should be used to address only the most serious forms of wrongdoing and that civil and administrative measures are more appropriate for less serious problems”.<sup>10</sup> Therefore, it is necessary to analyse the culpability, conduct and harm that is involved in reckless trading to assess whether it is a sufficiently serious form of wrongdoing to warrant a criminal penalty.

12.07 In this Chapter, the Commission considers whether reckless risk-taking in corporate bodies is the type of culpable conduct that should be criminalised and if so, how such an offence should be formulated. In Part B, the importance of commercial risk-taking is discussed and

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<sup>6</sup> See, Hanly, *An Introduction to Irish Criminal Law*, 3rd ed (Gill & Macmillan 2016) at 23; O’Malley, *Sentencing Law and Practice* 3rd edn (Round Hall 2016) at 35-40.

<sup>7</sup> Goode, *Commercial Law in the Next Millennium: The Hamlyn Lectures* (Sweet and Maxwell 1998) at 6.

<sup>8</sup> Vol. 396 *Dáil Éireann Debates Companies (No.2) Bill 1987 Report Stage* (6 March 1990).

<sup>9</sup> Sections 610 and 611 of the *Companies Act 2014*.

<sup>10</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LCR IP 8 - 2016) at 11.

distinguished from the negative risk-taking that amounts to reckless trading. Part C will analyse the existing law on civil remedies reckless trading, in Ireland and abroad. Part D will outline the nature of recklessness in Irish criminal law and will discuss the culpability, conduct and harm involved “reckless trading” under the Commission’s definition.

## B. The Nature of Commercial Risk-taking

### 1. Introduction

- 12.08 The Commission recognises the importance of commercial risk-taking to the Irish economy and the importance of corporate law in facilitating and encouraging that risk-taking. One concern is that the criminalisation of reckless trading will make corporate managers more risk averse.<sup>11</sup> Laws that apply to commercial decision making must not deter or punish entrepreneurship or beneficial risk-taking. The powerful deterrent effect the criminal law can generate could arguably serve to discourage some commercial activity.
- 12.09 However, not all risks taken in companies should be encouraged. In certain situations, corporate managers should be risk averse and certain risks should be prohibited. The law should aim to encourage and facilitate the positive forms of risk-taking while deterring negative forms of risk-taking. To do this, the law must differentiate risk-taking that should be facilitated and encouraged from risk-taking likely to result in harm. As Goddard notes, a problem for the law in this area is determining at what point should the law stop encouraging enterprise and instead seek to deter it.<sup>12</sup>
- 12.10 Not all risk-taking should be considered reckless. Arguably, any criminal offence of reckless trading should only capture situations where a corporate manager consciously disregarded substantial and unjustifiable operational risk-taking that actually, and culpably, results in harm to creditors. Reckless operational risk-taking refers to risks that are substantial and unjustifiable in relation to the interests of creditors.<sup>13</sup> Conscious disregard of substantial and unjustifiable risks is the definition of recklessness that is used in Irish criminal law.<sup>14</sup> This is different from the definition used in the context of reckless trading under the civil law provisions set out in the *Companies Act 2014*.<sup>15</sup>

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<sup>11</sup> Ahern, *Directors’ Duties: Law and Practice* (Roundhall 2009) at 127.

<sup>12</sup> Goddard, “Corporate Personality – Limited Recourse and its Limits” in Grantham and Rickett (eds), *Corporate Personality in the 20th Century* (Hart 1998) at 26.

<sup>13</sup> This term, and the contrasting idea of entrepreneurial risk-taking, is explained further below.

<sup>14</sup> *The People (DPP) v Murray* [1977] IR 360; *The People (DPP) v Cagney and McGrath* [2008] 2 IR 111; *Clifford v Director of Public Prosecutions* [2013] IESC 43.

<sup>15</sup> Recklessness under the civil law provision requires the conscious disregard of an “obvious and serious risk of loss or damage to others” in line with the test set out by Lynch J in *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 222.

## 2. The importance of commercial risk-taking

- 12.11 At the heart of commercial enterprise is an element of risk-taking.<sup>16</sup> There is an inherent uncertainty in any investment; as a result, risk and reward are inextricably linked.<sup>17</sup> Investors must risk losing their investment and managers must take decisions involving risk in order to further their commercial ventures. Risk is inherent in business because of the difficulty in predicting the outcome of commercial decisions given the complexity and unpredictability of a market economy. If entrepreneurial activity is to flourish, the legal system must not inhibit the risk-taking that is essential to the health the economy.<sup>18</sup>
- 12.12 Commercial enterprise is vital to competition, trade, and employment. To maintain a healthy market economy, the law should not discourage investment, and, in some cases, it should provide protection from the risk of business failure.<sup>19</sup> In *Re Usit World Plc*,<sup>20</sup> the High Court (Peart J) addressed the importance of commercial risk-taking, stating that “it is the very essence of entrepreneurial endeavour that risks are taken.<sup>21</sup> If an entrepreneur were to be obliged . . . to avoid taking any decision which at some date in the future might be found to have risk attached to it, the business life and a large component of the economic driver of the economy of the State would stultify”.<sup>22</sup> In recognition of the importance of facilitating commercial activity, the fundamental doctrines of company law are designed to allow for commercial risk-taking.<sup>23</sup>
- 12.13 Because a company is granted separate legal personality,<sup>24</sup> unless an exception applies, the rights of the company's creditors are confined to the assets of the limited liability company and usually there is no recourse against the personal assets of the company's members.<sup>25</sup> The effect is that there is a cap on the possible losses and the assets of the company's members are protected from the claims of company creditors.<sup>26</sup> As well as immunity from the claims of creditors. The *Companies Act 2014* makes it clear that a

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<sup>16</sup> Ahern, *Directors' Duties: Law and Practice* (Roundhall 2009) at 124.

<sup>17</sup> O'Hanlon, “The Corporate Form and Reckless Trading: A Modern Pandora And Epimetheus” (2006) 28(1) DULJ 254, at 254.

<sup>18</sup> Goode, *Commercial Law in the Next Millennium: The Hamlyn Lectures* (Sweet and Maxwell 1998) at 6.

<sup>19</sup> Lord Irvine, “The Law as an Engine for Trade” (2001) 64(3) MLR 333, at 344.

<sup>20</sup> [2005] IEHC 285.

<sup>21</sup> *Re USIT World Plc* [2005] IEHC 285, at paragraph 78.

<sup>22</sup> *Ibid* at paragraph 80.

<sup>23</sup> Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue* 2nd ed (Bloomsbury 2012) at 435.

<sup>24</sup> Courtney describes separate legal personality as follows: “A body corporate, unlike a partnership or other unincorporated association is more than the aggregation of individual units; it constitutes a juristic or legal person with a legal identity separate and distinct from that of its members”. Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 210.

<sup>25</sup> Davies, *Introduction to Company Law* (OUP 2002) at 10-11.

<sup>26</sup> Hansmann and Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 3rd edn (OUP 2017) at 9.



member of a private limited company is only liable to the company to the extent of their investment.<sup>27</sup>

- 12.14 Members of other types of company, such as the designated activity company,<sup>28</sup> companies limited by guarantee, and the public limited company,<sup>29</sup> are also only liable to the extent of their investment. The members of these companies are therefore protected from both the company's claims and the claims of the company's creditors, which ensures the limited liability of the members. Unlimited companies have separate legal personality but not limited liability. The members of unlimited companies are liable to contribute to any debts that the company is unable to pay. However, unlimited companies are relatively rarer than other forms.<sup>30</sup>
- 12.15 The limitation of liability is the vehicle by which commercial risk-taking is encouraged in order to facilitate investment and economic activity.<sup>31</sup> It encourages investment, as investors are more likely to engage in business if they know that the potential loss is limited.<sup>32</sup> The effect of the limitation of liability is to transfer the risk of failure of an enterprise from the members of the company to its creditors. As was recently noted by the Company Law Review Group, limited liability "has been a means of incentivising and encouraging entrepreneurs to overcome aversion to risk and to make investments in business ventures that might be beneficial to the economy at large".<sup>33</sup> It is clear that this limitation of liability is effective in encouraging commercial enterprise and as Lynch-Fannon and Murphy state, "[t]here is no doubt that the granting of the privilege of limited liability to businesses did indeed contribute to the expansion of commercial activity in all jurisdictions in which it was introduced".<sup>34</sup>
- 12.16 However, limited liability is a privilege, not a right. The legal position that companies enjoy limited liability is a default rule only, a rule to which numerous exceptions exist. Members are free to contract out of limited liability by providing personal guarantees for part or all of the company's debts. Several legal rules exist to disregard the distinction between the company and its members. For example, in situation where there is misuse of the corporate form a member can be made liable for the company's debts.<sup>35</sup>

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<sup>27</sup> Section 17(2) of the *Companies Act 2014*.

<sup>28</sup> A Designated Activity Company is a private company limited by shares or by guarantee that has an objects clause setting out the objective or activity of the company.

<sup>29</sup> A Public Limited Company is a company with listed shares that may be offered to the public.

<sup>30</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 2457.

<sup>31</sup> Kettle, "Improper Trading in Ireland and Britain" (1994) 12 *ILT* 91, at 91.

<sup>32</sup> French, *Mayson, French and Ryan on Company Law* 34th ed (OUP 2007) at 27.

<sup>33</sup> Company Law Reform Group, *Report on the Protection of Employees and Unsecured Creditors* (2017) at 18.

<sup>34</sup> Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue* 2nd ed (Bloomsbury 2012) at 392.

<sup>35</sup> *Re Bugle Press* [1961] Ch 270; *Re Shrinkpak* High Court 20 December 1989.

- 12.17 However, reckless trading relates to the actions of managers, usually the board of directors, who control the operations of a company. The importance of the limited liability of members is that, if a company undergoes an insolvent (unable to pay its debts as they fall due)<sup>36</sup> winding up,<sup>37</sup> the creditors will not receive the full payment of the debt owed, and will be unable, unless an exception applies, to seek satisfaction of their debts from the members of the company.
- 12.18 While limited liability protects members from both the claims of creditors and the company, it is the separate legal personality of the company that protects managers. In general, the company's debts and liabilities cannot be extended to the personal assets of its managers. Unless an exception applies, they are protected from the claims of company members, creditors, and the company itself. Managers do not act in their own capacity, but their actions are considered those of the company. This separation between the company's wealth and that of its managers is designed to encourage them to take risk; if managers were liable for all losses, they may be less likely to take risks on the company's behalf.<sup>38</sup>
- 12.19 As well as the protections afforded by separate legal personality and the limitation of liability, the Irish courts have recognised the difficulties inherent in commercial judgment and that risk-taking is an important part of commercial activity.<sup>39</sup> The Irish courts are reluctant to assess the commercial merits of business decisions, even if a company has entered an insolvent winding up. Simply because a business has failed does not give rise to proof of wrongdoing. For example, the High Court (Murphy J), in *Business Communications Ltd v Baxter and Parsons*, held "[o]ne must be careful not to be wise after the event, there must be no "witch hunt" because a business failed as businesses will".<sup>40</sup>

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<sup>36</sup> There are a number of grounds set out by section 570 of the *Companies Act 2014* that can result in a company being legally defined as insolvent. First, if a creditor is indebted in a sum exceeding €10,000 and has served on the company a demand in writing requiring the company to pay the sum so due and the company has, for 21 days after the date of the service of that demand, neglected to pay the sum to the reasonable satisfaction of the creditor. Second, if two or more creditors are indebted in a sum exceeding €20,000 and have served on the company a demand in writing requiring the company to pay the sum so due and the company has, for 21 days after the date of the service of that demand, neglected to pay the sum to the reasonable satisfaction of the creditor. Third, if execution or other process issued on a judgment, decree, or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part. Fourth, if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

<sup>37</sup> A winding up refers to the process whereby an end is put to the carrying on of the business of a company. The company's assets are collected to be applied in discharge of the company's debts in order of preference as determined by the Companies Acts and any remaining balance is distributed among the members according to their rights and interests.

<sup>38</sup> Forde and Kennedy, *Company Law* 5th ed (Roundhall 2017) at 4.

<sup>39</sup> For example, see: *Business Communications Ltd v Baxter and Parsons* High Court 21 July 1995; *Re Camote Construction Ltd* [2005] IEHC 346; *Re USIT World Plc* [2005] IEHC 285.

<sup>40</sup> *Business Communications Ltd v Baxter and Parsons* High Court 21 July 1995. These words have been cited regularly by the courts. See, for example, *Re Camote Construction Ltd* [2005] IEHC 346.

12.20 In general, the courts hold that directors should not be punished for errors of commercial judgment without further culpability.<sup>41</sup> As Davies explains, to do so would be to discourage the taking of commercial risks which must be the lifeblood of corporate activity.<sup>42</sup> This judicial approach adds a further layer of protection and encouragement from managers engaging in risk-taking.

### 3. Problematic risk-taking

12.21 The nature of the limited liability company is that there will be some risk to those who advance credit.<sup>43</sup> As risk is inherent in commercial activity, it follows that protecting managers and members from the negative outcomes of those risks will result in that risk being shifted to the company's creditors. The potentially harmful effect of the limited liability principle becomes apparent when the company is insolvent and has insufficient assets to meet the claims of all creditors. If the company becomes insolvent and the members have limited liability and the managers cannot be made personally liable, then it is the creditors who will bear the loss. Given the importance of encouraging risk-taking, the question is how best to achieve a balance "between protecting creditors and not discouraging a corporation's ability to innovate and take appropriate business risks".<sup>44</sup>

12.22 The effect of separate legal personality on creditors was evident in the case of *Salomon v A Salomon and Co Ltd*,<sup>45</sup> the case on which the modern understanding of separate legal personality is based. The House of Lords held that the primary shareholder and manager of the company would not be made personally liable for the company's debts. It was the creditors who had to bear the loss of the company's failure. It is noteworthy that the concept of corporate personality was associated with the transfer of risk from members to creditors. However, the decision in the House of Lords did recognise the potential problems that could arise from the application of separate legal personality,<sup>46</sup> and the courts have since recognised the possibility for abuse of separate legal personality and limited liability.<sup>47</sup>

12.23 When a company becomes insolvent, the creditors may lose some or all of the debt owed, however, creditors engage in calculated risk-taking by advancing credit. Risk is inherent in commercial activity and creditors may lose the value of the debt owed. The decision to

<sup>41</sup> Clarke, "Duty of Care Skill and Diligence – From Warm Baths to Hot Water" (2016) 56(56) Ir Jur 139, at 148.

<sup>42</sup> Davies, Gower and Davies, *Principles of Modern Company Law* 8th edn (Sweet and Maxwell 2008) at 247.

<sup>43</sup> Dabner, "Insolvent Trading: Recent Developments in Australia, New Zealand and South Africa" (1995) *Journal of Business Law* 283, at 305.

<sup>44</sup> Swarcz, "Rethinking a Corporations' Obligations to Creditors" 17 *Cardozo L Rev* 673, at 689.

<sup>45</sup> *Salomon v A Solomon Co Ltd* [1897] AC 2.

<sup>46</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 2. Lord Halsbury held that corporate personality should only apply if there was "[n]o fraud and no agency and if the company is a real one".

<sup>47</sup> Lord Irvine, "The Law as an Engine for Trade" (2001) 64(3) *MLR* 333, at 344.

extend credit is voluntary; creditors risk a loss in the hope of making a profit.<sup>48</sup> Accordingly, the law should not, in general, protect creditors from losses in the ordinary course of business.<sup>49</sup> Where creditors do extend credit, they can, through contract, mitigate risk when lending. For example, a creditor can refuse to lend to a limited liability company without personal guarantees from the managers or members. In addition, creditors can obtain security over company assets.<sup>50</sup> Often, the borrower provides security and the creditor can discharge the debt from the asset if a company is unable to repay its debts.

12.24 However, protections achieved through contract have limitations. Security or personal guarantees are unavailable to creditors who do not rely on a contract such as tort victims or the Revenue Commissioners.<sup>51</sup> Also, taking security is often only available to creditors with significant bargaining power, such as banks or other lending institutions. Most importantly, a contract provides no protection for creditors for certain managerial actions. An obvious scenario where creditors are protected by law from the actions of management is where fraud is committed. A contract cannot protect against fraud, which involves intentional deception designed to either enrich a person or cause damage to another.<sup>52</sup>

12.25 Another situation where creditors need special protection outside of contract is where a company is used to shift risk on to creditors. The managers then act recklessly, while they and the members of the company are protected from losses by the separate legal personality of the company and limited liability. This situation shall be considered in the next section.

#### **4. Different types of risk-taking**

12.26 While protecting risk-taking is vital for commercial enterprise, when the privileges conferred by separate legal personality and limited liability are abused, through reckless operational risk-taking, the law should no longer protect those persons engaged in such risk-taking. To provide a basis for the rest of the Chapter, distinctions will be drawn between positive risk-taking that the law should encourage and negative risk-taking likely to result in harm to creditors that the law should aim to deter.

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<sup>48</sup> Goddard, "Corporate Personality – Limited Recourse and its Limits" in Grantham and Rickett (eds), *Corporate Personality in the 20th Century* (Hart 1998) at 22.

<sup>49</sup> *Ibid* at 27.

<sup>50</sup> See, Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at chs 19 and 20.

<sup>51</sup> The Revenue Commissioners have preferential credit status under section 621 of the *Companies Act 2014*.

<sup>52</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 477.

**(a) Entrepreneurial risk**

12.27 For the purposes of this Chapter, entrepreneurial risks are risks taken where the company itself or the members bear the risk and suffer the harm if the risk results in failure. An offence of reckless trading would not be targeted at entrepreneurial risk, because the focus of reckless trading is on protecting creditors from abuse of separate legal personality.

12.28 Members of companies that enjoy the privileges of limited liability remain liable to the extent of their investment. The risk of entering business is that managers may make commercial misjudgements, or external factors may exist, that result in harm to the company and the loss of some, or all, of that investment. Entrepreneurial risks, even if reckless, fall outside the scope of the harm targeted by reckless trading.

*Example 1 – Entrepreneurial Risk-Taking*

A company has liquid assets of €100,000 and debts of €20,000. The board of directors decide to invest €50,000 of company funds into an area which they are aware is (and is widely regarded to be) volatile and unpredictable. The investment is a completely new departure from the company's existing business activities; the board has no expertise or experience in this area and do little due diligence prior to investing. The investment fails and all €50,000 is lost within one month.

12.29 Despite the obvious negative consequences, it is clear from the financial position of the company that the creditors were bearing no risk and the company was clearly solvent. The risk was borne entirely by the company, although the members may suffer loss due to a drop in the value of their shares. This decision could be interpreted as reckless entrepreneurial risk, given the lack of expertise and due diligence conducted by the board. As a result, the board may be in breach of their duty to act with care skill and diligence,<sup>53</sup> but, arguably, this behaviour should not amount to reckless trading and the current civil liability provisions on reckless trading do not target this type of behaviour.

**(b) Operational risk**

12.30 For the purposes of this Chapter, operational risks are risks taken where the company's creditors bear risk and suffer harm if the risk results in failure. Professor Lynch-Fannon has defined operational risk as risk taken at "a point of insolvency, illiquidity or where additional debt is incurred at a point of trading where the incurring of that debt leads to insolvency".<sup>54</sup> Operational risk under this definition refers to 3 situations. First, insolvent trading, where there will always be some risk. Second, trading when the company is in

<sup>53</sup> See, Clarke, "Duty of Care Skill and Diligence – From Warm Baths to Hot Water" (2016) 56 Ir Jur 139.

<sup>54</sup> Lynch-Fannon, "Reckless Trading: Good and Bad Risk-taking in Irish Companies" (2017) 24(1) CLP 7, at 8.

financial difficulty or approaching insolvency. Third, where the managers incur extra debt that leads to insolvency, moving the company from solvency to insolvency.

12.31 Operational risk-taking is a situation where creditors are bearing risk, either when the company is insolvent, approaching insolvency, or where the company was solvent but it was foreseeable to the person causing the company to take the risk that the company would enter insolvency. It is important to note that not all operational risks are negative, even if a company is already insolvent. It is a fact of business that creditors will bear the risk of commercial decisions. Ceasing trading immediately upon insolvency may cause loss to creditors,<sup>55</sup> and, depending on the circumstances, premature cessation of trading can be as damaging as continuing to trade while insolvent.<sup>56</sup>

12.32 Some operational risk-taking may be beneficial not just to the company but also to the creditors. As Davies notes, it can be in “the interests of both creditors (higher recovery of their debts) and of shareholders and other stakeholders . . . if the company can be turned around or its business disposed of in some other way which an immediate cessation of trading or liquidation might jeopardise”.<sup>57</sup> Case law has recognised that trading while insolvent or close to insolvency may be the correct commercial decision once the “creditors’ interests are kept to the fore”<sup>58</sup> and it doesn’t include “careless or reckless gambling”.<sup>59</sup> The High Court (Lynch J), in *Re Hefferon Kearns Ltd*,<sup>60</sup> provided the clearest endorsement of the necessity of continuing to trade while in serious financial difficulty:

“[i]t would not be in the interests of the community that whenever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and close down the business. Many businesses which might well have survived by continuing to trade, coupled with remedial measures, could be lost to the community.”<sup>61</sup>

12.33 Because of the potential for operational risk-taking to be beneficial, the view of the Commission is that any criminal offence of reckless trading should target only reckless operational risk-taking that actually, and culpably, causes harm to creditors. Therefore, in a potential criminal offence of reckless trading, the Commission is of the view that not all situations where creditors are made to bear the risk of loss will amount to an offence. The disregarded risk of harm to creditors must be both substantial and unjustifiable.

<sup>55</sup> Campbell, “Wrongful Trading and Rescue” (1994) *Cambrian L Rev* 69, at 75.

<sup>56</sup> Goode, *Principles of Corporate Insolvency Law* (Sweet and Maxwell 1990) at 209.

<sup>57</sup> Paul Davies, Gower and Davies, *Principles of Modern Company Law*, 8th ed (Sweet and Maxwell 2008) at 222.

<sup>58</sup> *Re USIT World Plc* [2005] IEHC 285, at paragraphs 70-71.

<sup>59</sup> *Re Failte Logistics and Distribution Ltd; Leahy v O’Keefe and O’Keefe* [2016] IEHC 589.

<sup>60</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191.

<sup>61</sup> *Ibid* at 224.

Example 2 - Justifiable operational risk-taking

A company is insolvent within the meaning of section 570 of the *Companies Act 2014*. The company has existing assets worth €20,000 and debts of €100,000. There is no possibility that the company will return to solvency, however, if the company completes its last remaining contract there will be an extra €70,000 available for distribution to its creditors. There is some doubt as to whether the company will be able to complete the contract but the company has consistently been able to fulfil contracts of this kind in the past. Completing the contract will require the company to sell most of its remaining assets.

12.34 In example 2, the creditors are bearing the risk and so it is an operational risk. If the company fails to complete the contract, the company will not gain the extra €70,000 and will have incurred further losses by continuing to trade. However, because the company has a record of fulfilling similar contracts and, if successful, the €70,000 will discharge most of the company's liabilities, it is a justifiable operational risk.

Example 3 – Justifiable operational risk-taking

A company is insolvent within the meaning of section 570 of the *Companies Act 2014*. The company has existing assets worth €50,000 and debts of €500,000. The company has little chance of returning to solvency but if the company completes its last remaining contract there will be at least an extra €400,000 available for distribution to its creditors. To complete the contract the company must borrow an additional €8,000 from a new creditor who is aware of the financial position of the company. There is a minor possibility that completing the contract will result in the company being able to discharge all its liabilities. If the company remains insolvent, then the creditor who advanced the €8,000 will be the lowest priority creditor and will receive no satisfaction of the debt owed.

12.35 Creditors' interests may vary widely, and different creditors may have different interests in whether or not the company continues trading. The debt owed to each creditor may differ and different creditors often have priority over other creditors if the company is wound-up. When a company is wound-up, the rules of corporate insolvency provide for an order of priority in which debts are to be paid.<sup>62</sup> According to these rules, some creditors will have priority over other creditors and will receive satisfaction of their debts in advance of other creditors.

12.36 A difficulty with the "substantial and unjustifiable" standard differentiating acceptable from unacceptable risk-taking is the context-sensitive nature of that standard. When measured against the perspectives of different creditors with different orders of priority, a

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<sup>62</sup> See, for example, section 621 of the *Companies Act 2014*.

risk may seem either justifiable or unjustifiable. The same risk may be “substantial and unjustifiable” to one creditor but may, not only be justifiable, but highly likely to be highly beneficial to two other creditors. A risk may be justifiable to one creditor with a high order of priority, who is owed the bulk of the company’s debt, but will be unjustifiable for low order priority creditors, who make up the minority of the company’s debt. It may be in the interests of a high order priority creditor, who will receive full satisfaction of the debt owed, to have the company wound-up. On the other hand, unsecured creditors, who, if the company is immediately wound-up will receive nothing, will want the company to continue trading in the hope that it will return to solvency.

12.37 It can be difficult to determine what constitutes a “substantial and unjustifiable” risk on a given set of facts, because creditors will have different, and sometimes competing, interests. Should a risk be determined as “substantial and unjustifiable” for the purposes of reckless trading if it presents a “substantial and unjustifiable” risk to one single creditor, but that same risk is likely to be beneficial to all other creditors? A difficulty arises because creditors’ interests here do not aggregate in the same way as they do for the purposes of the common law duty owed to creditors on insolvency (described in greater detail below).<sup>63</sup> For the purposes of that duty, all the creditors have an interest in the company not continuing to trade in circumstances where that would leave the creditors in a worse position than on liquidation.<sup>64</sup> Every creditor has an interest in preserving the remaining assets of the company on insolvency. By contrast, creditors will have more individually weighted interests regarding whether the company should take particular risks, as the individual creditor may have more or less to gain from the risk and they may be more or less likely to lose out substantially if the risk results in failure. This makes application of the “substantial and unjustifiable” risk standard difficult, as it will necessarily require privileging the perspective of one or more creditors over other creditors. In some respects, this would even run directly counter to the existing common law duty, as a part of that duty is that a director should not improperly prefer one creditor to the general body of creditors.<sup>65</sup>

12.38 Example 3 outlines a scenario in which the potential benefit of a successful outcome far outweighs the potential losses of an unsuccessful outcome to the creditors, as a whole, even though these benefits and losses accrue to different creditors. This scenario indicates a justifiable risk in the circumstances, despite the fact that the company is incurring debt after insolvency and is incurring a debt while aware of a substantial risk that the company

<sup>63</sup> *Re Frederick Inns Ltd* [1994] 1 ILRM 387; *Hughes v Hitachi Koki Imaging Solutions Europe* [2006] IEHC 223, [2006] 3 IR 457. See Ahern, *Director’s Duties: Law and Practice* (Roundhall 2009) at 179 - 182 for general discussion of this duty.

<sup>64</sup> Ahern, *Director’s Duties: Law and Practice* (Roundhall 2009) at 184. Citing: *Re Welfab Engineers Ltd* [1990] BCLC 833; Grantham, “Directors’ Duties and Insolvent Companies” (1991) 54 MLR 576. See also: *Winkworth v Edward Baron Development Co Ltd* [1986] 1WLR 1512, at 1516: the directors have a duty to “keep [the company’s] property inviolate and available for the repayment of its debts”.

<sup>65</sup> Ahern, *Director’s Duties: Law and Practice* (Roundhall 2009) at 184. Citing: *Re Swanpool Ltd (In Voluntary Liquidation)*; *McLaughlin v Lannen* [2005] IEHC 341, [2006] 2 ILRM 217, at 224.



may be unable to pay it back. This risk is not reckless as it is in the interests of the creditors as a whole.

Example 4 - Insubstantial Operational Risk

A company has debts of €110,000 but is owed €105,000 from a UK based Public Limited Company. To expand the company's business, the company's board of directors borrow an additional €10,000 from a bank. The UK-based plc has an exceptional reputation in commercial circles and is known for its prompt repayment of debts. Due to completely unforeseeable circumstances, and unknown to the company's managers, a week prior to the debt to the company falling due, the UK based plc enters winding up and is unable to repay any of its debts.

12.39 A substantial risk occurs when potential harm is highly foreseeable. In the above example, the decision to borrow extra funds at a point when the company had greater debt than it had assets was an operational risk. However, there was a low risk that the creditors would suffer loss because of the decision to borrow. The sum borrowed was low and there was a high likelihood that the company would receive €105,000 from the UK-based company. Due to the unforeseeable nature of the collapse of the UK-based public limited company, the risk taken was an unsubstantial risk.

Example 5 – Reckless Operational Risk Resulting in Harm

A company has liquid assets of €100,000 and debts of €400,000. The company has no outstanding contracts and there are no outstanding debts owed to the company. The board of directors decide to invest €50,000 of company funds into an area that is widely regarded to be volatile and unpredictable. The directors are aware of the nature of this new investment and understand that there is an overwhelming chance that the company will lose the investment but are desperate and willing to take any gamble to try and save the company. The investment is a completely new departure from the company's existing business activities; the board has no expertise or experience in this area and do little due diligence prior to investing. The investment fails and the €50,000 is lost. Following this, the High Court orders the compulsory wind-up of the company because it is unable to pay its debts as they fall due following a petition from an aggrieved creditor.

12.40 The above example is a reckless operational risk, which the directors consciously disregarded, that caused harm to creditors. The company could have been wound up and the €100,000 set aside to be distributed to the company's creditors through the winding up process in accordance with the *Companies Act 2014*. As examples 2 and 3 show, in certain situations, it may be justifiable to keep trading. In the above example, it is clear that the company has extremely little chance of returning to solvency, given the financial position of the company and the fact that it had no outstanding debts or contracts. As such, the trading activity exhibited is reckless, it disregards a substantial and unjustifiable

risk of pecuniary harm to creditors, and the trading activity's failure has resulted in the creditors being in a worse position.

## 5. The incentive for reckless risk-taking

12.41 Creditors are entitled to ownership of the company's assets at the point of winding up.<sup>66</sup>

Prior to winding up on insolvency, the directors' duty to act in the best interests of the company subsides and instead there is a duty to act in the creditors' interests.<sup>67</sup> The importance of creditors' interests on insolvency was stated in *Blayney J* in the Supreme Court case of *Re Frederick Inns Ltd*: "[b]ecause of the insolvency of the companies the members no longer had any interest. The only parties with an interest were the creditors".<sup>68</sup> This approach ensures as much of the assets as possible are available to creditors on winding-up.

12.42 Despite the importance of the creditors' interests at a point of insolvency, the managers still control the company's affairs prior to a winding up. On insolvency or financial difficulty, it is often in the interests of the members and managers to engage in high risk business activities. There is an incentive to engage in high-risk activity where the managers realise that the risk, if successful, will lead to the company's survival and, if unsuccessful, the creditors will bear the loss.<sup>69</sup> The managers and members have little to lose by such risks if the doctrines of limited liability and separate legal personality will protect them.<sup>70</sup> If the company trades out of its difficulties, the members will benefit but, because of limited liability, they will suffer no additional losses if the company's finances continue to decline. From the managers' and members' point of view, there are no disadvantages to reckless risks, only advantages.<sup>71</sup> From the creditors' perspective, it may be better to take a conservative approach, ensuring as many assets as possible are available for distribution in a winding up.

12.43 The problems arising from limited liability and separate legal personality create a "perverse incentive" to engage in high-risk activity.<sup>72</sup> This incentive becomes particularly strong where managers are also shareholders. Even if the directors are not shareholders,

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<sup>66</sup> See, Tirole, *The Theory of Corporate Finance* (Princeton University Press 2006) at 389-95.

<sup>67</sup> *West Merica Safety Wear v Dodd* (1988) 4 BCLC 252.

<sup>68</sup> *Re Frederick Inns Ltd* [1994] ILRM 387, at paragraph 47. The companies in that case were clearly insolvent and had significant debt and on the verge of winding up

<sup>69</sup> Ahern, *Directors' Duties: Law and Practice* (Roundhall 2009) at 453.

<sup>70</sup> Davies, Gower and Davies, *Principles of Modern Company Law* 8th edn (Sweet and Maxwell 2008) at 221.

<sup>71</sup> Prentice, "Corporate Personality, Limited Liability and the Protection of Creditors" in Grantham and Rickett (eds), *Corporate Personality in the 20th Century* (Hart 1998) at 105.

<sup>72</sup> Prentice, "Creditors' Interests and Directors' Duties" (1990) 10 OJLS 265 at 265; Campbell, "Wrongful Trading and Rescue" *Cambrian L Rev* 69, at 78; Gustaffason, "Beating A Dead Horse: An Assessment of Wrongful Trading" (2017) *Company Lawyer* 239, at 240.

they have an incentive to save the company, and to save their positions and the advantages that go with them.<sup>73</sup>

12.44 This incentive, and the need to correct for it, has been recognised in a series of cases, across multiple common law jurisdictions<sup>74</sup> which provide that company directors owe a duty to creditors<sup>75</sup> on insolvency. The duty aims to protect creditors when the company is financially distressed.<sup>76</sup> The most often cited passage on the duty to creditors is from the *Kinsella v Russell Kinsella Property Ltd* case in the Court of Appeal of New South Wales, a passage approved by the Supreme Court in *Re Frederick Inns Ltd*:<sup>77</sup>

“In a solvent company the proprietary interests of the shareholders entitled them as a general body to be regarded as the company when questions of the duty of directors arise . . . But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and the directors to deal with the company’s assets. It is in a practical sense their assets and not the shareholders’ assets that, through the medium of the company, or under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration”.<sup>78</sup>

12.45 The House of Lords (Lord Templeman), in *Winkworth v Edward Baron Development Co Ltd*, outlined the nature of the duty and its purpose:

“A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors”.<sup>79</sup>

12.46 This statement outlines the potential for abuse of creditors by managers, and recognises the need for the law to address this potential for abuse. In the context of directors’ duties, this is achieved by developing a duty owed by directors on insolvency. Certain case law

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<sup>73</sup> Prentice, “Corporate Personality, Limited Liability and the Protection of Creditors” in Grantham and Rickett (eds), *Corporate Personality in the 20th Century* (Hart 1998) at 105.

<sup>74</sup> *Parkes v Hong Kong & Shanghai Bank Corp* [1990] ILRM 341; *Re Frederick Inns Ltd* [1991] 1 ILRM 582; *Jones v Gunn* [1997] 3 IR 1. *Kinsella v Russell Kinsella Pty Ltd* (1986) 4 ACLC 213. *Winkworth v Edward Baron Development* [1987] 1 ALL ER 114.

<sup>75</sup> This duty is owed to the company and not directly to creditors. See Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 1021.

<sup>76</sup> Van Der Weide, “Against Fiduciary Duties to Corporate Stakeholders” (1997) 21 *Delaware Journal of Corporate Law* 27, at 31.

<sup>77</sup> *Re Frederick Inns Ltd* [1994] 1 ILRM 387.

<sup>78</sup> *Kinsella v Russell Kinsella Property Ltd* [1986] 4 NSWLR 722, at 730.

<sup>79</sup> *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.

also recognises that a duty arises not just on insolvency, but also where a company is in financial difficulty and approaching insolvency.<sup>80</sup> The predominant view of the case law is that the directors must give special consideration to the company's creditors if the company is in a state of financial difficulty.<sup>81</sup> The case of *Ultraframe Ltd v Fielding*<sup>82</sup> outlines this view:

“when a company, whether technically insolvent or not, is in financial difficulties to the extent that its creditors are at risk, the duties which the directors owe to the company are extended so as to encompass the interests of the company's creditors as a whole (not to any individual), as well as those of the shareholders”.

12.47 Numerous Irish cases have recognised that directors owe a duty to creditors. *Re Frederick Inns Ltd* provides that, on insolvency the company directors owe a duty to creditors.<sup>83</sup> This was endorsed by the High Court in *Jones v Gunn*<sup>84</sup> and *Hughes v Hitachi Koki Imaging Solutions Europe*.<sup>85</sup> In *Re DSC Ltd; Fitzpatrick v Henley*<sup>86</sup>, the High Court held that “amongst the important duties of directors is one to ensure that when it becomes clear that a company is insolvent, the assets are preserved and dealt with in accordance with the requirements of the Companies Acts”.<sup>87</sup>

12.48 As is clear from the above case law, the courts are aware of the increased potential for harm to creditors when a company is in financial difficulty and the need to correct for it. The common law duty owed to creditors, while focused on protecting creditors when a company enters insolvency, arguably has insufficient penalties to adequately correct for the powerful incentive that exists to engage in reckless risk-taking. The solution employed in several jurisdictions has been to enact statutory exceptions to separate legal personality through laws prohibiting reckless trading<sup>88</sup> or wrongful trading.<sup>89</sup>

12.49 In the view of Lynch-Fannon and Murphy,<sup>90</sup> and Lynch J in *Re Hefferon Kearns (No. 2)*,<sup>91</sup> in introducing reckless trading into Irish company law, the Oireachtas took the view that the

<sup>80</sup> *Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638.

<sup>81</sup> Keay, “The Director's Duty to take into Account the Interests of Company Creditors: When is it Triggered?” (2001) 25 *Melbourne University Law Review* 315, at 317.

<sup>82</sup> *Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638.

<sup>83</sup> *Re Frederick Inns Ltd* [1994] ILRM 387

<sup>84</sup> *Jones v Gunn* [1997] 3 IR 1, at 22.

<sup>85</sup> *Hughes v Hitachi Koki Imaging Solutions Europe* [2006] 3 IR 457.

<sup>86</sup> [2006] IEHC 179.

<sup>87</sup> *Re DSC Ltd; Fitzpatrick v Henley* [2006] IEHC 179, at paragraph 35.

<sup>88</sup> Section 610 of the *Companies Act 2014*.

<sup>89</sup> Section 214 of the *UK Insolvency Act 1986*.

<sup>90</sup> Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue* 2nd ed (Bloomsbury 2012) 416.

<sup>91</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 215.

balance in the case of limited liability had gone too far in favour of those who managed companies. The Cork Committee,<sup>92</sup> which recommended the introduction of wrongful trading in the UK, aimed to address the “structural bias” that exists in companies by exposing directors to a risk of wrongful trading.<sup>93</sup> The reasoning is such that, certain types of risk-taking in companies amounts to an abuse of the privilege of separate legal personality, and the persons carrying out those risks should lose that protection and be made liable for the company’s debts.

## C. Civil Liability for Reckless Trading

### 1. Introduction

12.50 Before considering whether a criminal offence for reckless trading should be introduced, it is necessary to consider the civil law provisions on reckless trading. A criminal offence, would, of course, have different objectives from civil remedies. However, a criminal offence would target similar conduct to reckless trading under the civil law. Examining the civil law provisions, and the case law dealing with those provisions, can highlight how the Irish courts assess reckless risk-taking and the problems that have arisen in the existing legislative framework. This would inform development of any new criminal offence which seeks to target similar conduct.

12.51 A further reason to consider the civil law is the *de minimis* principle of criminalisation or the minimalist approach to criminalisation. The minimalist approach to criminal law suggests that the criminal law should not be invoked unless other methods of enforcement are inappropriate.<sup>94</sup> Criminal law is a powerful tool to address wrongdoing; however, it is not the only potential legal response, and it should not be invoked if there are alternative means through the civil law of addressing a wrong or harm.<sup>95</sup> The proper approach to criminalisation is to assess whether a particular type of misconduct can be appropriately dealt with by the civil law, which will depend on the type of wrongdoing involved, the nature of the harm,<sup>96</sup> as well as the appropriateness of the remedy offered by the civil law.

12.52 Reckless trading under the civil law provides that an officer can be made personally liable for the debts of the company. The civil law provisions have two general aims. First, the

<sup>92</sup> Cork, *Insolvency Law and Practice: Report of the Review Committee* (1982).

<sup>93</sup> *Ibid* at ch 44.

<sup>94</sup> Ashworth and Horder, *Principles of Criminal Law* 7th ed (OUP 2013) at 31.

<sup>95</sup> It is important to note that the *de minimis* principle is an argument for the *sufficiency* of the application of the criminal law to an issue. It does not *require* that an issue be criminalised. All it maintains is that the criminal law should only be used where other legal responses have been found inadequate. This assumes that a legal response to the issue is warranted in the first place. The case for a legal response could, itself, be outweighed by other concerns (such as chilling effects). In such a case, even a satisfactory *de minimis* argument would not require criminalisation.

<sup>96</sup> *Ibid* at 33.

provision can serve to compensate creditors through personal liability.<sup>97</sup> Second, the threat of personal liability may serve to deter officers from acting recklessly in the first instance. The rationale being that imposing personal liability, and removing the protections afforded by separate legal personality, will correct the perverse incentives described earlier by creating a disincentive to engage in reckless risk-taking.<sup>98</sup>

12.53 It should be noted that, unlike the civil law, restitution (the restoration of unjustly made profits to their proper owner) is not a primary aim of the criminal law. In general, the criminal law aims to deter, punish, and publicly censure certain culpable conduct.<sup>99</sup> However, both the civil law and the criminal law can share the aim of deterrence. The Commission believes that deterrence is a vital component of any law dealing with reckless risk-taking in companies. If the civil law is incapable of providing a meaningful or sufficiently effective deterrent, then, in accordance with the *de minimis* principle of criminalisation, this is an important consideration in considering the criminalisation of reckless trading. Conversely, if the civil law is sufficient, or if there is reason to believe that the criminal law would produce additional harms that outweigh the *de minimis* case, then there would be good grounds for rejecting the case for criminalisation.

## **2. Reckless trading under the *Companies Act 2014***

12.54 Civil liability for reckless trading is provided for by section 610 and 611 of the *Companies Act 2014*. Sections 610(1) and 610(2) provide that, where an officer of a company carries on business recklessly or fraudulently in the course of winding up, the court may order that that officer is personally responsible for all or part of the debts of the company. Section 611 provides for certain orders the court can make supplemental to a declaration under section 610.

12.55 Under section 610 of the *Companies Act 2014*, an application for reckless trading can be taken against the officers of a company that has entered an insolvent winding up or examinership and where creditors have suffered harm as a result.

12.56 Section 610(2) provides for an officer to be personally liable for all or part of the company's debts. Two subsections provide the grounds necessary to be established for imposing personal liability. First, under section 610(1), personal liability may be imposed where a subjective reckless test is satisfied. The test requires the officer to knowingly disregard of an "obvious and serious risk".<sup>100</sup> Second, under section 610(3), personal liability may be imposed where an officer is "deemed" reckless. There are two separate

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<sup>97</sup> Lynch-Fannon, "Reckless Trading: Good and Bad Risk-taking in Irish Companies (2017) 24(1) CLP 7, at 12.

<sup>98</sup> Hirt, *The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance* (2004) 1(1) *European Company and Financial Law Review* 71, at 115.

<sup>99</sup> Simester and Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) at 10.

<sup>100</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191.

“deeming provisions”, satisfying either of which is sufficient to impose personal liability. The effect of the “deeming provisions” is that behaviour falling outside the subjective reckless test of section 610(1) can be “deemed” to fit within the meaning of that test for the purposes of imposing personal liability. The deeming provisions are objective in nature and are entirely separate to the subjective recklessness test.

12.57 If an officer satisfies the subjective test or either of the “deeming provisions”, a defence is still available where the honesty and responsibility of the officer’s conduct would justify relieving that person of liability, either wholly or in part.

**(a) Requirement of a circumstance of insolvent winding up or examinership**

12.58 Sections 610 and 611 require that, to impose personal liability on an officer, the company must be in the course of being wound-up or in examinership. Winding-up is the process whereby a company is dissolved; its assets are collected and are applied in discharge of all its debts, with any remainder being returned to the members. Examinership, as set out by part 10 of the *Companies Act 2014*, is the process where a company that is unable to pay its debts is placed under the protection of the court to enable a court-appointed examiner to investigate whether the company can survive. Section 610(4)(a) provides that the winding up or examinership must be insolvent as defined by section 570 of the *Companies Act 2014*.

**(b) The Applicant**

12.59 A liquidator, an examiner of the company, a receiver of property of the company or any creditor may bring a claim of reckless trading. By comparison, only the liquidator can bring the claim in the corresponding provision in England and Wales.<sup>101</sup> This restriction has received significant criticism,<sup>102</sup> and recent reform proposals advanced by various UK government departments recommend extending the scope of possible applicants to examiners and creditors.<sup>103</sup>

12.60 A necessary requirement of reckless trading is that the applicant, or the person on whose behalf the application is made, must have suffered loss or damage as a consequence of the reckless trading.<sup>104</sup> In the absence of loss or damage caused by the reckless trading, the court has no power to impose personal liability. In the leading Irish case on reckless

<sup>101</sup> Section 214 of the UK *Insolvency Act 1986*.

<sup>102</sup> Keay, “Wrongful Trading: Problems and Proposals” (2014) NILQ 63, at 76.

<sup>103</sup> See, Department for Business, Innovation and Skills, *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Businesses* (July 2013); Department for Business, Innovation and Skills, *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Businesses: Government Response*.

<sup>104</sup> Section 610(4)(b) of the *Companies Act 2014*.

trading, *Re Hefferon Kearns Ltd*, the applicant was unable to establish loss or damage, and so liability for reckless trading could not be imposed.<sup>105</sup>

### (c) Who can be subject to liability

12.61 Reckless trading applications can be taken against any officer of the company. A case must be established against each officer. The High Court, in *Re Hefferon Kearns Ltd*, held that that reckless trading applies “individually and personally against each of the officers and a case must be made out against each officer, there is no collective responsibility”.<sup>106</sup>

12.62 The term “officer” is defined in the *Companies Act 2014* as including a “director or secretary” in relation to a body corporate.<sup>107</sup> Section 611(6) states that, for the purposes of reckless trading under the *Companies Act 2014*, “officer” includes “a statutory auditor or liquidator or provisional liquidator of the company, a receiver of property of the company and a shadow director of it.” Therefore, a shadow director (“a person in accordance with whose directions or instructions the directors of a company are accustomed to act”)<sup>108</sup> is an officer for the purposes of reckless trading. The definition of “officer” was extended to include shadow directors and *de facto* directors (“a person who occupies the position of director of a company but who has not been formally appointed as such director shall . . . be treated, for the purposes of this Part, as a director of the company”)<sup>109</sup> for the whole of Part 5 of the *Companies Act 2014*.

### (d) Party to the carrying on of any business of the company

12.63 To impose personal liability, the officer must have been a party to the carrying on of any business. The English fraudulent trading case of *Re Maidstone Building Provisions Ltd*<sup>110</sup> has been relied upon by the Irish Courts<sup>111</sup> as providing guidance as to the phrase of “parties to the carrying on of the business”. In *Re Maidstone*, the Chancery Division of the High Court (Pennycuik VC) held that active participation or concurrence in the carrying on of business was required. In that case, a company secretary and financial advisor escaped

<sup>105</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 225.

<sup>106</sup> *Ibid* at 219.

<sup>107</sup> Section 2(1) of the *Companies Act 2014*. This is the same definition as appeared in section 1 of the *Companies Act 1963*.

<sup>108</sup> Section 221 of the *Companies Act 2014*. A shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act, unless the directors are accustomed so to act by reason only that they do so on advice given by him or her in a professional capacity

<sup>109</sup> Section 222 of the *Companies Act 2014*. A *de facto* director is a person who occupies the position of director of a company but who has not been formally appointed as such director. A person shall not be a *de facto* director of a company by reason only of the fact that she or he gives advice in a professional capacity to the company or any of the directors of it.

<sup>110</sup> *Re Maidstone Building Provisions Ltd* [1971] 3 ALL ER 363.

<sup>111</sup> *Re Hunting Lodges Ltd* [1985] ILRM 75, at paragraph 45.



liability for fraudulent trading because, while he knew of the fraud, he was not actively engaged in the company's management. The Court held:

“The expression “parties to the carrying on of the business” is not, I think a very familiar one but, so far as I can see, the expression, “party to” must on its own natural meaning indicate no more than “participation in”, “takes part in” or “concur in”. And that, it seems to me, involves some positive steps of some nature. I do not think that it can be said that someone is party to carrying on a business if he takes no positive steps at all.”<sup>112</sup>

12.64 In *O’Keeffe v Ferris*, a fraudulent trading case, it was stated that the term “knowingly a party to the carrying on of any business” meant that a “person cannot be made amenable under the section unless they have actively participated in the management of the company”.<sup>113</sup> Active participation has been defined broadly by the Irish courts. In *Re Hunting Lodges Ltd* it was held that “any business” included a single transaction.<sup>114</sup> The respondent was not actively involved in the general management of the company and did not know of the fraudulent payment of money, but did know about the relevant sale and forged signatures on relevant documents. Carroll J held that she was party to the carrying on of any business.

12.65 *Re PSK Construction Ltd* suggests that knowledge, and failing to object to a risk, can be enough to constitute being a party to the carrying on of business. Finlay Geoghegan J held “I am satisfied that she was a party to the carrying on of the business of the company insofar as she was made aware of the decision taken by Mr. Killeen and did not object to same”.<sup>115</sup>

12.66 The above cases indicate that being a “party to the carrying on of business” requires active participation. However, active participation is defined broadly; a single positive act or a failure to act while having certain knowledge can constitute active participation sufficient to meet the definition of a “party to the carrying on of business” of the company.

**(e) Knowingly a party to the carrying on of any business of the company in a reckless manner**

12.67 Section 610(1)(a) sets out a subjective test for reckless trading. It states that an officer must be “knowingly a party to the carrying on of any business of the company in a reckless manner”. In the civil law context, there is some doubt as to the precise meaning of

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<sup>112</sup> *Ibid* at 368.

<sup>113</sup> *O’Keeffe v Ferris* [1997] 3 IR 463, at 469.

<sup>114</sup> *Re Hunting Lodges Ltd* [1985] ILRM 75.

<sup>115</sup> *Re PSK Construction Ltd* [2009] IEHC 538, at paragraph 33.

recklessness and whether it is to be interpreted as objective,<sup>116</sup> or subjective.<sup>117</sup> This has led Courtney to conclude that “the meaning of the word reckless poses great difficulties of interpretation”.<sup>118</sup> However, the cases on reckless trading have established that “knowingly” and “reckless” combine to create a subjective fault element.

- 12.68 The High Court, in *In Re Hefferon Kearns Ltd (No. 2)*,<sup>119</sup> considered the objective form of recklessness from the Supreme Court decision of *Donovan v Landys Ltd*.<sup>120</sup> The Court, however, rejected this formulation, as the inclusion of “knowingly” in section 33(1)(a) of the *Companies (Amendment) Act 1990* was intended by the Oireachtas to create a subjective standard of reckless.<sup>121</sup>
- 12.69 In *Re PSK Construction Ltd*<sup>122</sup> the test of “obvious and serious risk” was endorsed as the correct test of recklessness.<sup>123</sup> In that case, the company experienced financial difficulties and the main director decided to under-declare and under-pay the company's debts to the Revenue Commissioners to the amount of €2,361,314. The main directors had been advised to cease trading but had not followed that advice. The High Court (Finlay Geoghegan J) held that the officer “must have known” that his actions “involved an obvious and serious risk of loss or damage to creditors of the company.”<sup>124</sup>
- 12.70 An “obvious and serious risk”, based on *Re Hefferon Kearns Ltd*, is a similar but distinct definition of recklessness to “substantial and unjustified” used in Irish criminal law. Both tests are subjective. The inclusion of “serious” and “substantial” also appear to serve the same function of ensuring the risk involved is non-trivial, but is in fact potentially grave. The primary difference between the two definitions is the inclusion of unjustifiable. It is possible for a risk, particularly in a commercial context, to be obvious and serious but also be justifiable given the surrounding circumstances. This important distinction is discussed further, below.

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<sup>116</sup> The Supreme Court, in a tort action, in *Donovan v Landys Ltd* [1963] IR 441, citing with approval *Shawinigan Ltd v Vokins & Co Ltd* [1972] AC 877, concluded that recklessness was to be judged by an objective standard.

<sup>117</sup> See *Herrington v British Railways Board* [1971] 2 QB 107, at 126.

<sup>118</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 1109.

<sup>119</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191.

<sup>120</sup> *Donovan v Landys Ltd* [1963] IR 441. Kingsmill J stated “[t]he only test, in my view, is an objective one. Would a reasonable man, knowing all the facts and circumstances which the doer of the act knew or ought to have known, describe the act as “reckless” in the ordinary meaning of that word in ordinary speech”.

<sup>121</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 222.

<sup>122</sup> [2009] IEHC 538.

<sup>123</sup> *Re PSK Construction Ltd* [2009] IEHC 538, at paragraph 27.

<sup>124</sup> *Ibid* at paragraph 30.

**(f) Deemed reckless trading**

12.71 The “deemed reckless” provisions in section 610(3) of the *Companies Act 2014* allow for an officer to be deemed reckless for the purpose of imposing personal liability. The effect of the provisions is that where the officer commits certain behaviour he or she will be “deemed” to “have been knowingly a party to the carrying on of any business of the company in a reckless manner”, even without satisfying that particular test.

*(i) Carrying on business while ought to have known it would cause loss to creditors*

12.72 The first deeming provision is set out in section 610(3)(a) of the 2014 Act. Section 610(3)(a) imposes liability in situations where an officer ought to have known that their actions would cause loss to creditors. The test is objective; there is no requirement to prove that the officer subjectively disregarded an obvious and serious risk. The test is evaluated by reference to what a hypothetical reasonable person in the same role would expect. Therefore, the position of the officer determines the standard of behaviour expected, not the subjective knowledge of the officer.<sup>125</sup> If a reasonable person, in the same role, ought to have known that their actions would cause loss to creditors, then the officer will be deemed as reckless, regardless of whether the officer in question knew or ought to have known.

12.73 The inclusion of “would” means that the loss to creditors must be foreseeable to a high degree of certainty. This has proven to be extremely onerous to establish, as doubt as to the certainty of loss to creditors negates liability. In *In Re Hefferon Kearns Ltd (No. 2)*, Lynch J stated the equivalent provision in section 33(2)(a) of the *Companies (Amendment) Act 1990* “requires knowledge, or imputed knowledge, that the first defendant’s actions or those of the company would cause loss to creditors: it is not sufficient that there might be some worry or uncertainty as to the ability to pay all creditors”.<sup>126</sup>

12.74 The Court of Appeal, in *Re Appleyard Motors Ltd*,<sup>127</sup> overturned the decision of the High Court based on the meaning of “would”.<sup>128</sup> The High Court imposed personal liability for the company’s debts on two directors after the company accepted payment for cars days prior to the company being wound-up. Shortly after the payment was received the company entered winding-up, at which point the company was unable to provide the cars. The applicant claimed that the directors ought to have known that accepting payment, at a time when the company was clearly in serious financial trouble, would have caused a loss. The High Court (Binchy J) held that, given that the financial position of the company

<sup>125</sup> This is a similar test to the director’s duty of care test in section 228(1)(g) of the *Companies Act 2014*. See Clarke, “Duty of Care Skill and Diligence – From Warm Baths to Hot Water” (2016) 56 Ir Jur 139.

<sup>126</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 223.

<sup>127</sup> *Re Appleyard Motors Ltd* [2015] IECA 28

<sup>128</sup> *Re Appleyard Motors Ltd* [2015] IEHC 28.

was continually deteriorating and had no prospect in sight for improvement, the respondents should have known that accepting the payment would have caused a loss.

12.75 The Court of Appeal (Hogan J) further held that, although the company was in financial difficulty, the respondents could not have known for sure that taking the payment would have caused loss, so long as the company had support from its bank. It was not until after the company had taken payment that the bank withdrew its support. The bank's support meant that it was not certain that the company, by accepting the payment, would have caused loss to creditors. The Court held, in relation to section 297A(2)(a) of the *Companies Act 1963*:<sup>129</sup>

“It is not enough that, viewed objectively, an experienced director ought to have known that his actions or those of the company might cause loss to a creditor. Section 297A(2)(a) imposes an even more exacting requirement: viewed objectively, ought an experienced director to have known that the actions in question would cause loss. This suggests that the loss to the creditor must have been foreseeable to a high degree of certainty.”<sup>130</sup>

12.76 The Court held that an officer in a similar position would have known that there was a real risk that creditors might not be paid. However, the relevant issue was whether an officer in a similar position ought to have known that his conduct, or that of the company, would cause loss to the particular creditor. On the facts, the Court of Appeal concluded that, so long as the company had support from its bank, the loss to the creditor was not sufficiently certain.<sup>131</sup>

12.77 The decision of the High Court in *Re Hefferon Kearns Ltd (No. 2)* and the decision of the Court of Appeal in *Re Appleyard Motors Ltd* demonstrate the difficulty in establishing certainty of loss to creditors, even when it is judged by an objective standard.

(ii) *Contracting debt at a point when there are no reasonable grounds for a belief that the company would be able to pay the debt when it fell due*

12.78 The second deeming provision is set out in section 610(3)(b). The provision imposes liability on officers who increase a company's debt after there were no reasonable grounds to think the company could pay back that debt as well as all its other debts. Merely trading or incurring debt while insolvent will not automatically satisfy this test. Insolvent trading or incurring debt while insolvent is permitted, once there are reasonable

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<sup>129</sup> The equivalent provision is section 610 of the *Companies Act 2014*. Given the similarity between the provisions, the pre-2014 case law is still of relevance. In *Toomey v Sedgewick* [2016] IECA 280, the Court of Appeal stated: “as the events in question pre-date the coming into force of the Companies Act 2014 on 1st June 2015, it is agreed that the provisions of s. 297A of the 1963 Act continue to apply. In any event, s. 610 of the 2014 Act reproduces more or less verbatim the provisions of s. 297A of the 1963 Act.”

<sup>130</sup> *Re Appleyard Motors Ltd* [2015] IECA 28 at paragraph 41.

<sup>131</sup> *Ibid* at paragraph 42.

grounds to believe that the debt will be paid off. Incurring debt while solvent will satisfy the test, if it was at a point when there were no reasonable grounds that the company could pay that debt along with its other debts. If a director has the subjective belief that the company is able to pay debts, but there are no reasonable grounds for such a belief, then the director can be found to have traded recklessly.

12.79 In *Re Hefferon Kearns Ltd (No. 2)*, the High Court (Lynch J) found that the officer satisfied the test despite the Court's view that the officer in question had acted in the creditors' interests. The facts of the case were such that it was better for the creditors to avoid an immediate winding up and continue trading, incurring more debt, to complete one of its unfinished contracts. The Court held that the officer was deemed to be knowingly a party to reckless trading, as he contracted debts at a time when he knew that those debts, together with all other debts, could not be paid as they fell due.<sup>132</sup> The Court strongly criticised an equivalent provision,<sup>133</sup> stating that the deeming provision:

“appears to be a very wide ranging and indeed draconian measure, and could apply in the case of virtually every company which becomes insolvent and has to cease trading for that reason. . . It would not be in the interests of the community that whenever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and close down the business. Many businesses which might well have survived by continuing to trade, coupled with remedial measures, could be lost to the community”.<sup>134</sup>

12.80 Clearly, incurring debt while insolvent can be reasonable in certain circumstances.

#### **(g) Analysis of the deeming provisions**

12.81 A difficulty with both deeming provisions is that it is possible that an officer may act reasonably and justifiably, but still be deemed as having traded recklessly.<sup>135</sup> The Court of Appeal in *Re Appleyard Motors Ltd* describes the nature of the deeming provisions, highlighting how they are entirely separate from the recklessness test. The Court, in relation to section 297A(2) of the *Companies Act 1963*, which contained the deeming provisions, stated that the provision was not concerned with reckless trading as such;

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<sup>132</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 224.

<sup>133</sup> Section 33 of the *Companies (Amendment) Act 1990* had been replaced by section 297A of the *Companies Act 1963* (inserted by section 138 of the *Companies Act 1990*).

<sup>134</sup> *Ibid* at 224-225.

<sup>135</sup> However, this possibility would have to be viewed in light of the overall proviso in section 610(2) that a court need only make an order “if it thinks it proper to do so”. This could be interpreted as giving the court some scope to decline to make an order making an officer personally liable for debts of the company where the risks taken were justified. A similar proviso existed in section 297A(1) of the *Companies Act 1963*.

rather, it was concerned with ascribing personal liability for conduct which would not be considered reckless. Making reference to this distinction the court stated:

“I stress this point because the very artificiality of the deeming provision tends to create the erroneous impression that cases coming within 297A(2)(a) are specific categories of reckless trading so identified by the Oireachtas.”<sup>136</sup>

12.82 The Court of Appeal clearly distinguishes the operation of the deeming provisions from the subjective test for reckless trading. The subjective test defines reckless trading, whereas the “deeming provisions” outline certain additional, and potentially non-reckless, situations where liability may be imposed. Such situations may include responsible actions, because the deeming provisions have no requirement for the subjective disregard of an obvious and serious risk. As such, section 610(8) provides for a defence that aims to ensure the section does not operate unjustly.

**(h) The defence of acting honestly and responsibly**

12.83 Under section 610 (8) of the 2014 Act, in circumstances where an officer is found to satisfy either the subjective reckless test or either deeming provision, a defence of acting honestly and responsibly operates such that the court will have discretion to relieve that person of liability imposed by the section, either wholly or in part.

12.84 As outlined above, in *Re Hefferon Kearns Ltd (No. 2)* the officer fell within the meaning of the second deeming provision. On the basis that the officer’s decision-making was reasonable, and he had acted in the interests of the creditors as a whole, the High Court (Lynch J) held that the officer’s actions were honest and responsible and relieved the officer of any personal liability.<sup>137</sup>

12.85 The Court went on to outline two situations where incurring further debt, at a point when the director knows the company is insolvent, will be responsible. First, if the company becomes insolvent because of the insolvency of a large debtor or if a major funder suddenly withdraws support. Second, if continuing to trade would mean there was more money available for the creditors as a whole. The Court held that the reason for the defence was because of the “wide-ranging effects” of the deeming provisions. It seems clear that the reason for the inclusion of the defence is to mitigate against the harshness of the broad deeming provisions. This is particularly important where an officer has acted reasonably.

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<sup>136</sup> *Re: Appleyard Motors Ltd* [2016] IECA 280, at paragraphs 37 and 38.

<sup>137</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191, at 225.

### 3. Analysis of Reckless Trading under the *Companies Act 2014*

- 12.86 The primary goal of the civil law on reckless trading is to provide compensation or restitution to creditors. A secondary effect is to deter reckless risk-taking, through the threat of personal liability, by making officers liable for the debts of the company. Certain conclusions can be drawn as to the current law's ability to achieve either of those aims. If there are significant barriers to applications for reckless trading and it is unlikely to be regularly enforced, this will frustrate both objectives. Without successful applications, no creditor will receive compensation, and without, at least, the possibility of enforcement, there is unlikely to be a deterrent effect.<sup>138</sup> Even the most severe threats of punishment will have little deterrent effect if there is a low chance of enforcement.<sup>139</sup>
- 12.87 Since the introduction of the reckless trading provisions in 1990, there have been very few reported judgments. This suggests that creditors are not receiving regular compensation through civil liability for reckless trading, although it is possible that cases have settled out of court. Nonetheless, it appears that reckless trading is not taking place, that it is occurring but applications are not being taken, or that it is taking place but claims are not pursued.
- 12.88 Applications for reckless trading are limited to liquidators, examiners, receivers or any creditor.<sup>140</sup> One reason why reckless trading under the civil law is that enforcement relies on private actors. Liquidators are unlikely to risk the costs of initiating proceedings and risk further reducing the amount of money payable to creditors, unless there is a high probability of success.<sup>141</sup> Predicting the probability of success, given the complexity of the legislation and the broad nature of the defence, is difficult. This complexity was noted by Lynch-Fannon, who criticises the varying nature of the tests used in reckless trading from subjective recklessness, to objective assessment of conduct, to a defence of acting honestly and responsibly.<sup>142</sup>
- 12.89 This difficulty will be exacerbated by the potential for high costs of any action. An action for personal liability for the company's debt, in situations where the officers have significant personal wealth, are likely to be strongly contested. A major consideration for any private actor will be the costs involved in taking an application. For instance, *Re Appleyard Motors Ltd* concerned a debt of €47,000 and went from the High Court,<sup>143</sup> to

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<sup>138</sup> Hanly, *An Introduction to Irish Criminal Law*, 3rd ed (Gill & Macmillan 2016) at 23; Hirt, "The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance" (2004) 1 *European Company and Financial Law Review* 71, 116.

<sup>139</sup> O'Malley, *Sentencing Law and Practice* 3rd edn (Round Hall 2016) at 39.

<sup>140</sup> Section 610(1) of the *Companies Act 2014*.

<sup>141</sup> Campbell, "Wrongful Trading and Rescue" (1994) *Cambrian L Rev* 69, at 78.

<sup>142</sup> Lynch-Fannon, "Reckless Trading: Good and Bad Risk-taking in Irish Companies" (2017) 24(1) *CLP* 7, at 10.

<sup>143</sup> *Re Appleyard Motors Ltd* [2015] IEHC 28.

the Court of Appeal,<sup>144</sup> to the Supreme Court,<sup>145</sup> which refused leave for a second appeal. Any liquidator will be concerned with the costs of litigation and must ensure that company funds are not needlessly wasted.<sup>146</sup> The same would likely be the case with examiners.

12.90 A further reason why reckless trading is unlikely to be regularly enforced is difficulties with the remedy of personal liability. Applications are unlikely to be taken unless there is a good prospect of some tangible benefit to creditors.<sup>147</sup> The remedy will be of no value where the managers are personally bankrupt, a situation that is particularly likely where a company manager has given personal guarantees for the company's debts. One officer in *Re Appleyard Motors Ltd*<sup>148</sup> was excused from a reckless trading action because he was bankrupt. Empirical research from the UK shows that 7 out of 12 officers facing personal liability under wrongful trading<sup>149</sup> (the equivalent UK provision to reckless trading) were personally insolvent within 6 months of the judgment.<sup>150</sup> Even if a director is not personally bankrupt, in situations where a company's debts are significant and extend far beyond an officer's personal wealth, the remedy, even after a successful application, will do little to satisfy a company's creditors.<sup>151</sup>

12.91 The difficulty of directors' absence of wealth serves not only to undermine the aim of restitution, but also the aim of deterrence. If an officer is personally insolvent, or will be personally insolvent, when the company enters an insolvent winding up, a remedy of personal liability provides no legal deterrent to reckless trading.<sup>152</sup> This difficulty is not unique to the Irish provision, and applies to any law where the remedy is personal liability, regardless of the drafting of the provision.<sup>153</sup>

12.92 A creditor, even if successful in an application against directors with personal wealth, will not receive compensation directly. The remedy of personal liability is a contribution to the general pool of funds to be distributed among the company creditors. The creditor who made the application will not be directly compensated for the loss suffered, but rather will receive any additional funds through a normal distribution under insolvency law. This may

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<sup>144</sup> *Re Appleyard Motors Ltd* [2016] IECA 280.

<sup>145</sup> *Re Appleyard Motors Ltd* [2017] IESC 2.

<sup>146</sup> Keay, "Wrongful Trading: Problems and Proposals" (2014) NILQ 63, at 70.

<sup>147</sup> Campbell, "Wrongful Trading and Rescue" (1994) *Cambrian L Rev* 69, at 78.

<sup>148</sup> *Re Appleyard Motors Ltd* [2015] IEHC 28.

<sup>149</sup> Section 214 of the UK *Insolvency Act 1986*.

<sup>150</sup> Williams, "What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?" (2015) 78 *MLR* 55.

<sup>151</sup> Campbell, "Wrongful Trading and Rescue" (1994) *Cambrian L Rev* 69, at 79.

<sup>152</sup> That said, it is also likely that individuals will naturally be deterred from becoming insolvent. It is possible that declaring bankruptcy may achieve a lesser deterrent effect, but it is not the case that one can simply circumvent deterrent effects entirely simply by becoming insolvent before the company does.

<sup>153</sup> Gustaffason, "Beating a Dead Horse an Assessment of Wrongful Trading" (2017) 38 *Company Lawyer* 239, at 245.



deter creditors from taking an action, as there is no guarantee that a creditor will significantly benefit personally from taking an application.<sup>154</sup>

12.93 The above factors of the potential for high costs, enforcement not being publicly undertaken but only available to private actors, the complexity of the legislation, and the nature of the remedy, combine to provide a strong argument that reckless trading, under the existing Irish civil law provisions, is unlikely to be regularly enforced. If reckless trading is not enforced then it will not provide compensation to creditors. Further, civil liability for reckless trading will not generate a deterrent if officers know that enforcement is unlikely.

12.94 The difficulties of reckless trading relating to difficulties with private enforcement and the nature of the remedy are not limited to the Irish provisions and extend to civil provisions in other jurisdictions that deal with similar conduct to that targeted by reckless trading. In general, the deterrent impact of civil law remedies in this area of law is widely doubted,<sup>155</sup> and it has been argued that personal liability rules do not act as effective deterrents to corporate director misconduct.<sup>156</sup>

#### 4. Wrongful Trading

12.95 Wrongful trading, under section 214 of the UK *Insolvency Act 1986*, is the UK equivalent to civil liability for reckless trading. Section 214 provides that, where a company goes into insolvent liquidation, where a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvency, the court may declare the director liable to make such contribution to the company's assets as the court thinks proper. This is subject to the condition that they court may not make such an order where it is satisfied that the director took every step to minimise loss to the creditors as he ought to have taken.

##### (a) Making an Application

12.96 Wrongful trading applications can be taken against the directors of insolvent companies that are in the course of being wound up. Director includes shadow directors<sup>157</sup> and *de facto* directors.<sup>158</sup> Only a liquidator can bring an application. This is narrower than reckless trading under the *Companies Act 2014*, which allows for creditors, receivers, and examiners to bring applications. The restriction that only a liquidator may take an action has been submitted as the reason for the low number of cases brought under section

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<sup>154</sup> Ahern, *Director's Duties: Law and Practice* (Roundhall 2009) at 476.

<sup>155</sup> Finch, *Corporate Insolvency Law: Perspectives and Principles* 2nd edn (CUP 2009) at 749; Williams, "What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?" (2015) 78 MLR 55, at 62.

<sup>156</sup> Baldwin, "The New Punitive Regulation (2004) 63 MLR 351, at 368.

<sup>157</sup> Section 214(7) of the *Insolvency Act 1986*.

<sup>158</sup> *Re Hydrodam (Corby) Ltd* [1994] BCC 161, at 162.

214,<sup>159</sup> with Keay arguing that wrongful trading would be improved by public enforcement methods through the Secretary of State.<sup>160</sup> Again, it is clear that relying on private actors, who are heavily influenced by the low probability of recovering costs, is unlikely to result in regular enforcement.

### **(b) The test for imposing liability**

12.97 The test required by wrongful trading is substantially different from that of reckless trading under the *Companies Act 2014*. The basis for imposing personal liability is if a director continued to trade at a time when they “knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation”.<sup>161</sup> This is expanded upon in section 214(4) of the 1986 Act, which states that this test is evaluated objectively, based on what is to “reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company”. Therefore, the test does not include a requirement based on subjective recklessness. Rather, it allows for the imposition of liability where the director *ought to have known* the company was destined for insolvent liquidation. The test is similar to the one set out in section 610(3)(b) of the *Companies Act 2014*, the second of the deeming provisions, which provides for an officer to be made personally liable if they contract a debt at a point when they did not honestly believe, on reasonable grounds, that the company would not be able to repay the debt alongside its other debts.

12.98 As was highlighted in *Re Hefferon Kearns (No. 2)*,<sup>162</sup> provisions based on continued trading after insolvency can be problematic, as incurring debt may be of benefit to the creditors as a general body. To account for this issue, a defence operates such that the “person took every step with a view to minimising the potential loss to the company’s creditors”.<sup>163</sup> The defence is more demanding than the defence available for civil liability in the Irish provisions based on acting honestly and responsibly, as it requires a significant positive obligation of taking “every step” to minimise potential losses. Goode developed a 12-point list of actions that he considered should be taken to minimise losses to creditors.<sup>164</sup> These include: obtaining professional advice, ensuring account information is up to date, and frequent board meetings on remedial action with full recorded board minutes.

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<sup>159</sup> Schulte, “Enforcing Wrongful Trading as a Standard of Conduct for Directors and a Remedy for Creditors” (1999) 20 *Company Lawyer* 80, at 88.

<sup>160</sup> Keay, “Wrongful Trading: Problems and Proposals” (2014) NILQ 63, at 76.

<sup>161</sup> Section 214(2)(a) of the UK *Insolvency Act 1986*.

<sup>162</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191.

<sup>163</sup> Section 214(3) of the *Insolvency Act 1986*.

<sup>164</sup> Goode, *Principles of Corporate Insolvency Law* (Sweet and Maxwell 1990) at 209.

## 5. Conclusions

12.99 The primary goals of wrongful trading, as stated by the reform committees recommending its introduction, were to deter and compensate.<sup>165</sup> Shortly after its enactment, wrongful trading was described as an “extreme departure” from separate legal personality,<sup>166</sup> and as “one of the most important developments in company law [in the last] century”.<sup>167</sup> However, it has become apparent in the intervening period, that, like reckless trading in Ireland, wrongful trading has failed in its objectives to deter and to compensate creditors. More recent commentary has described section 214 as a “paper tiger”,<sup>168</sup> with other commentators arguing that it needs reform.<sup>169</sup> McGee and Williams conclude that “section 214 is clearly a piece of legislation that has few teeth and is perceived by the business world as largely ineffective”.<sup>170</sup>

12.100 The deterrent impact of wrongful trading has been doubted<sup>171</sup> and similar to the Irish provisions, a low number of actions have been taken, which suggests that section 214 has done little for creditors in terms of compensation. Between 1986 and 2013, only 29 cases of wrongful trading were reported.<sup>172</sup> Williams argues that expanding or reforming the application of wrongful trading, based on personal liability, will be of limited use, regardless of the precise formulation. Williams’ argument is based on problems, already discussed, associated with private enforcement and issues with the remedy of personal liability.<sup>173</sup> Based on that view, any remedy based on personal liability as a result of private enforcement will be unlikely to achieve restitution or deterrence.

12.101 Lessons from Ireland, and England and Wales, highlight common difficulties with enforcement through private actors and with the remedy of personal liability. Not only are those two specific provisions unlikely to achieve the aims of compensation and deterrence, but any civil provision based on private enforcement and personal liability will be ineffective in achieving deterrence and compensation. Under the *de minimis* principle of criminalisation, the criminal law suggests that the criminal law should not be invoked

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<sup>165</sup> *The Jenkins Report* 1962 Cmnd 1749, at 499-500; Cork, *Insolvency Law and Practice: Report of the Review Committee* (1982) at 599. See also Williams, “What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?” (2015) 78 MLR 55, at 61.

<sup>166</sup> Davies, *Principles of Modern Company Law* (Sweet and Maxwell 2003) at 195.

<sup>167</sup> Prentice, “Creditors’ Interests and Directors’ Duties” (1990) 10 OJLS 265, at 277.

<sup>168</sup> Cook, “Wrongful Trading: Is it a real Threat to Directors or a Paper Tiger” [1999] *Insolvency Lawyer* 99, at 100.

<sup>169</sup> Keay, “Wrongful Trading: Problems and Proposals” (2014) NILQ 63; Williams, “What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?” (2015) 78 MLR 55.

<sup>170</sup> McGee and Williams, “Curbing Unfit Directors – Is Personal Liability an Empty Threat” (1993) *Insolvency Lawyer* 2 at 5.

<sup>171</sup> Finch, *Corporate Insolvency Law: Perspectives and Principles* 2nd edn (CUP 2009) at 749.

<sup>172</sup> Williams, “What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?” (2015) 78 MLR 55, at 60.

<sup>173</sup> *Ibid* at 69-75

unless other techniques are inappropriate.<sup>174</sup> The following section will consider issues that require consideration if the mechanism of the criminal law is to be usefully deployed in response to the issues described above.

## D. Criminalising Reckless Trading

### 1. Introduction

12.102 A general characteristic of the criminal law is that it deals with moral wrongs,<sup>175</sup> and crime has traditionally been regarded by the courts as a moral wrong.<sup>176</sup> Although not all crimes involve moral wrongs, and not all moral wrongs are criminalised, the more a certain action breaches moral principles, the more likely it will be deemed as requiring a criminal penalty.<sup>177</sup> Professor Stuart Green argues that the moral content of a given action can be assessed by having regard to the culpability of the actor, the wrongfulness of the action, and the social harmfulness of the action.<sup>178</sup> Green acknowledges that this framework does not constitute a full set of necessary or sufficient conditions for criminalisation in every instance.<sup>179</sup> However, the framework is useful for the purposes of determining the moral content of a type of conduct that has not historically been classified as a criminal offence.<sup>180</sup> The Commission is of the view that culpability, the type of conduct, and the harm involved in a given action are important considerations in assessing whether certain culpable conduct should be criminalised.

12.103 The first part of the above framework is the culpability or the personal fault element of a crime (*mens rea*). The fault elements of crimes are treated in a hierarchical way,<sup>181</sup> with certain states of mind being more culpable than others. Taking a certain action with intent to bring about an illegal result is more culpable than taking the same action and bringing about the same result through negligence. The importance of the culpability of the actor was recently expressed in *the People (DPP) v O' Shea*, where Clarke J stated, “[t]it is fair to say that, at least so far as serious criminal offences are concerned, the primary focus of the criminal law has traditionally been on the culpability or blameworthiness of the actions of those who are accused”.<sup>182</sup> The culpability of the actor, in the context of a

<sup>174</sup> Ashworth and Horder, *Principles of Criminal Law* 7th ed (OUP 2013) at 31.

<sup>175</sup> McIntyre and McMullen, *Criminal Law* (Roundhall, 2001) at 2.

<sup>176</sup> Ormerod, *Smith and Hogan's Criminal Law* 12th ed (OUP 2008) at 4.

<sup>177</sup> Packer, *The Limits of Criminal Sanction* (OUP 1968) at 262.

<sup>178</sup> Green, *Lying, Cheating and Stealing: A Moral Theory of White Collar Crime* (OUP 2006).

<sup>179</sup> *Ibid* at 30.

<sup>180</sup> See, Whelan, “Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’” (2013) 33 OJLS 535, at 539 applying Green’s framework in the context of criminal competition law.

<sup>181</sup> See Chapter 9 on the hierarchy of culpability.

<sup>182</sup> *The People (DPP) v O' Shea* [2017] IESC 41, at paragraph 2.5.

criminal offence of reckless trading, would be the standard of recklessness, as defined by Irish criminal law.

12.104 The second part of the framework is the wrongfulness of the action itself. A culpable state of mind is not, by itself, sufficient to justify a criminal penalty. The culpable state of mind must coincide with further conduct, circumstance, or result (*actus reus*) elements. The Commission has noted previously that “it is essential that the criminal law should be used to address only the most serious forms of wrongdoing”.<sup>183</sup> As such, the conduct of a corporate manager causing a company to engage in reckless operational risk-taking in the carrying on of the business must involve sufficiently wrongful conduct to warrant criminalisation.

12.105 While conduct may be wrongful and undertaken with a culpable state of mind, the criminal law generally requires that some harm must accrue from the wrongful action.<sup>184</sup> Husak has argued that any recommendations for criminalisation must be justified by, at least, ensuring that the criminalised conduct is wrongful and results in nontrivial harm.<sup>185</sup> In the reckless trading context, the harm is pecuniary harm to creditors.

12.106 In addition to examining the three elements of culpability, wrongfulness, and harm involved in reckless operational risk-taking, another important consideration is the potential effect of the introduction of a criminal offence of reckless trading. Ashworth argues that, where there is a question whether to criminalise conduct that is already a civil wrong, there must be particular attention given what justifies that criminalisation.<sup>186</sup> This argument follows the *de minimis* principle of criminalisation, which holds that the criminal law should not be invoked unless other techniques are inappropriate.<sup>187</sup>

12.107 On the above analysis, the civil law provisions of reckless trading (currently provided in the *Companies Act 2014*) fail to effectively achieve their primary goals of restitution and the deterrence of reckless risk-taking. Although, restitution is not the traditional aim of the criminal law,<sup>188</sup> deterrence is one of its main objectives.<sup>189</sup> Given the civil law is unlikely to deter reckless operational risk-taking, the question arises as to whether the criminal law is

<sup>183</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LCR IP 8 - 2016) at 11.

<sup>184</sup> Ormerod, *Smith and Hogan's Criminal Law* 12th edn (OUP 2008), at 46.

<sup>185</sup> Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008) at 103.

<sup>186</sup> Ashworth "Is the Criminal Law a Lost Cause?" (2000) 116 LQR 225, at 233.

<sup>187</sup> Ashworth and Horder, *Principles of Criminal Law* 7th ed (OUP 2013) at 31.

<sup>188</sup> Professor Lynch-Fannon has argued that any fine imposed under a criminal offence of reckless trading should be made payable to creditors based on the Australian approach of allowing all enforcement actions to include an order of compensation to affected parties. Lynch-Fannon, "Reckless Trading: Good and Bad Risk-taking in Irish Companies (2017) 24(1) CLP 7, at 12 citing Keay and Welsh, "Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences" (2015) 15(2) *Journal of Corporate Law Studies* 255; Welsh, "Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia" (2014) 42(1) *Federal Law Review* 217.

<sup>189</sup> Hanly, *An Introduction to Irish Criminal Law* 3rd edn (Gill & Macmillan 2016) at 22-23.

capable of generating such a deterrent. A second question that arises is whether the criminal law is capable of holding persons engaged in reckless operational risk-taking to account.

12.108 The first aim of this Part is to establish whether reckless operational risk-taking that causes harm to creditors amounts to the sort of culpable conduct that should be criminalised. This will involve a discussion of the culpability of an actor under recklessness in Irish law, the type of conduct involved in reckless operational risk-taking, and the type of harm that can accrue from such conduct. The second aim of this section is to analyse whether the criminal law is capable of deterring operational risk-taking and holding managers to account for such behaviour.

## 2. Awareness of the nature of risk

12.109 Under Irish criminal law, the fault element of recklessness is subjective in nature. As such, for a person to be reckless, they must be aware of both the existence of the risk in question and the “substantial and unjustifiable” nature of that risk. The basis of the subjective interpretation of recklessness is that unreasonable, foolish, or careless conduct will not, as a general rule, give rise to criminal liability in the absence of subjective fault.<sup>190</sup> However, though the person must be aware of the substantial and unjustifiable nature of the risk, whether the risk is substantial and unjustifiable will be judged objectively.<sup>191</sup>

12.110 The Model Penal Code test for recklessness, as adopted by the Supreme Court,<sup>192</sup> requires that a person must have consciously disregarded substantial and unjustifiable risk in relation to the criminal conduct or result in question. Therefore, the conscious disregard of some risk is insufficient; the defendant must be aware of the substantial and unjustifiable nature of the risk. Charleton J states that this definition of recklessness requires the conscious running of an unjustified risk.<sup>193</sup> It follows that recklessness occurs when the conduct, circumstance, or result in question is not the aim, object, or purpose (intention) of the person, but the person is aware of a substantial and unjustified risk of perpetrating the wrongful conduct, or bringing about the wrongful result, and proceeds in taking that risk in any case.

12.111 In the civil law context, *Re PSK Construction Ltd*<sup>194</sup> is an example of how a subjective test for recklessness operates in a commercial setting. The Court, using the civil law test for recklessness, considered the seriousness of the risk that must be regarded in order for

<sup>190</sup> Law Reform Commission, *Report on Receiving Stolen Property* (LRC 23-1987) at 91. For a general discussion on the subjective interpretation of recklessness see *Ibid* at 89-94.

<sup>191</sup> Campbell, Kilcommins and O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 133.

<sup>192</sup> *The People (DPP) v Murray* [1977] IR 360.

<sup>193</sup> Charleton et al, *Criminal Law* (Butterworths 1999) at 45.

<sup>194</sup> *Re PSK Construction Ltd* [2009] IEHC 538.

conduct to be considered reckless. The second respondent was a non-executive director and an employee with no management role. She was aware that the company was in financial difficulty and was underpaying its tax to the Revenue Commissioners, but believed it was a temporary arrangement. She was aware that the company was underpaying tax but was not aware that this created an obvious and serious risk to creditors, as she had insufficient knowledge of the financial position of the company. On this basis, she was held not to have been reckless.<sup>195</sup> The second respondent had subjective knowledge of a risk, consciously disregarded that risk, but did not consciously disregard an obvious and serious risk, given her insufficient knowledge of the company's finances and given her belief that the underpayment of tax was temporary.

12.112 A wholly subjective test for recklessness may cause some difficulties. A corporate manager may take a reckless operational risk, aware that there is some risk, but unaware of the extent of the risk, even though any reasonable person would have known that the risk was substantial and unjustifiable. Although this may be unreasonable, this action would not meet a subjective standard of recklessness. The House of Lords, in *R v G*, held that a defendant who genuinely failed to perceive the risks he was running “may fairly be accused of stupidity or lack of imagination but neither of those failings should expose him to conviction of serious crime”.<sup>196</sup> While the statement is an accurate assessment of the subjective recklessness test, it should be noted that *R v G* involved two children aged 10 and 11. It will be easier for the prosecution to establish that a sophisticated corporate manager, with a high level of responsibility, was aware of the risks involved in a particular decision. If a given risk was such that any reasonable person would know that it was substantial and unjustifiable nature of the risk, it will be easier to establish that the manager was also aware of the nature of the risk. However, it is conceivable that the prosecutor could fail to satisfy the court that the manager was subjectively aware of the risk, even if any reasonable manager would have been aware of that risk.

### 3. Recklessness in a commercial context

12.113 Any recommendation for a criminal offence of reckless trading must, at the same time, permit the positive forms of commercial risk-taking. Entrepreneurial risk-taking and justifiable operational risk-taking should not be criminalised. This depends significantly on the definition of recklessness under Irish criminal law, as well as the formulation of the conduct, circumstance, and result elements (*actus reus*) of any proposed offence. The Model Penal Code definition of recklessness, with the inclusion of “unjustifiable” in the definition, is important in a commercial context.

12.114 To fit within the Model Penal Code definition of recklessness, the consciously disregarded risk must be both substantial and unjustifiable. As discussed in the examples above, a substantial risk has a high likelihood of potential harm. However, some substantial risks,

<sup>195</sup> *Re PSK Construction Ltd* [2009] IEHC 538, at paragraph 27.

<sup>196</sup> *R v G* [2003] UKHL 50, at paragraph 32.

particularly in a commercial context, may be justifiable depending on the circumstances. In general, an unjustifiable risk is a risk without good cause, having regard to the value of the activity involved<sup>197</sup> and the gravity of the risk.<sup>198</sup> This requires a balancing exercise between the value of the activity on the one hand, and the probability and gravity of harm that might be caused on the other.<sup>199</sup> In *R v G* the House of Lords endorsed a test for recklessness based on the subjective disregard of an “obvious and significant risk”.<sup>200</sup> The test applied for reckless in the civil law context of reckless trading was the subjective disregard of an “obvious and serious risk”.<sup>201</sup>

12.115 A business decision may represent an obvious and serious risk to creditors, but such risk may be justifiable given the commercial context. An operational risk that has a potentially extremely high value to creditors and the company may be justifiable, even if it poses a significant or serious risk to creditors.

#### 4. Subjective recklessness and culpability

12.116 The Model Penal Code definition of recklessness requires a defendant to consciously disregard a substantial and unjustifiable risk “that the material element exists or will result from his conduct”.<sup>202</sup> The material element, in the present context, is causing a company to take an operational risk, which resulted in harm to a creditor. To be a reckless operational risk under Irish criminal law, the risk taken must have been a substantial and unjustifiable risk to the creditors’ interests. Causing the company to take some business decision that presents risks in relation to the creditors’ interest is insufficient. Many business decisions will possess some element of risk to creditors, however, only those decisions that pose a substantial and unjustifiable risk to creditors will meet the Model Penal Code standard. This requirement, therefore, excludes entrepreneurial risk-taking and justifiable operational risk-taking.

12.117 Subjective fault requires the conscious wrongdoing of the defendant and therefore represents a higher level of culpability than objective fault.<sup>203</sup> To be subjectively reckless under Irish criminal law, not only must the risk taken be substantial and unjustifiable, judged objectively,<sup>204</sup> but the person undertaking the activity must have been aware it was substantial and unjustifiable and took the risk regardless. Consciously disregarding a

<sup>197</sup> McIntyre and McMullen, *Criminal Law* (RoundHall 2001) at 40.

<sup>198</sup> McIntyre, McMullen and O’Toghda, *Criminal Law* (RoundHall 2012) at 61.

<sup>199</sup> Campbell, Kilcommins and O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 133.

<sup>200</sup> *R v G* [2003] UKHL 50, at paragraph 32.

<sup>201</sup> *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 IR 191.

<sup>202</sup> Section 2.02(2)(c) of the *US Model Penal Code*.

<sup>203</sup> Ormerod and Laird, *Smith and Hogan’s Criminal Law* 14th ed (OUP 2015) at 113.

<sup>204</sup> Campbell, Kilcommins and O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) at 133.



substantial and unjustifiable risk is arguably more culpable than merely taking a risk which the person themselves does not appreciate as substantial and unjustifiable.

12.118 As mentioned previously, recklessness is a sufficiently culpable state of mind to impose a criminal offence. Using a corporate body to shift a substantial and unjustifiable risk on to creditors, while consciously disregarding that risk, requires a particularly culpable state of mind.

## 5. The conduct of reckless operational risk-taking

12.119 Recklessness, under the US Model Penal Code definition of recklessness, may be a sufficiently culpable state of mind to justify a criminal penalty in the context of reckless operational risk-taking. However, it is a fundamental aspect of the criminal law that a person may not be held criminally liable based upon his or her culpable mental state alone. The fault element of an offence must be made manifest by some conduct.

12.120 As discussed above, one of the difficulties of separate legal personality is that it can incentivise abuse of a corporate body when a company is in insolvency or financial difficulty but before it is wound up. At such a point, separate legal personality and limited liability can combine to create a powerful incentive to engage in high-risk business activity. If the risks are successful, and the company trades out of its difficulties, the members and managers will benefit, particularly if the managers also own shares. However, if the risks taken are unsuccessful and limited liability and separate legal personality apply, they will suffer no additional losses if the company's finances continue to decline. Instead, the creditors will bear the additional losses if the risks are unsuccessful, as there will be less wealth to distribute in the event of a winding up.

12.121 The relevant conduct in reckless operational risk-taking, as described immediately above, is a corporate manager causing a corporate body to shift the substantial and unjustifiable risk that a business activity will cause loss to creditors, resulting in the managers, members, and the company itself, bearing little or no risk, but retaining the potential for reward. The aim of such conduct is to provide benefit to the members and managers of the company at the potential expense of the creditors. Where this conduct actually results in harm to the creditors' interests, it is comparable to some existing criminal offences.

12.122 The most obvious comparator for the type of conduct involved in reckless trading is fraud. Fraud, as currently formulated, requires a high level of mental culpability; generally only intentional deception designed to either enrich a person or cause loss to another will suffice (see Chapter 11).<sup>205</sup> Under section 6 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* "[a] person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence." A corporate manager

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<sup>205</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 477.

would meet these criteria if they used a company to gain credit, intentionally deceiving creditors as to the nature of their investment, with the intention of benefitting the company or its members. The comparable situation in reckless trading would be a manager who used a company to gain credit, while aware of a substantial and unjustifiable risk to that creditor, with the intention of benefitting the company or its members. In both examples, the corporate manager intends to benefit one group at the expense of another. The difference between fraud and reckless operational risk-taking is the lack of intentional deception. Instead, there is conscious disregard of a substantial and unjustifiable risk of harming the creditors.

## 6. Reckless trading and harm

12.123 If certain culpable conduct causes harm to others, it may provide a good justification for imposing criminal liability.<sup>206</sup> However, causing harm, by itself cannot be a justification for recommending criminalisation. Under the *de minimis* principle of criminalisation, harm should not result in criminalisation if the conduct that caused the harm can be appropriately addressed by other methods such as the civil law, as discussed above. Further, when a company enters an insolvent winding up, the creditors will suffer loss, as they will not receive the full amount of the money owed. Creditors voluntarily accept the risk that a company may not be able to repay a debt in full. They are free not to advance credit and, if they decide to do so, they can protect themselves through contract by requiring personal guarantees or seeking security if the company is unable to repay the debt. However, in situations of reckless operational risk-taking, the culpability of the actor, the conduct, and the harm combine to distinguish such action from other harms associated with engaging in commercial activity.

12.124 While the harm caused in a commercial context is not always “as obvious as . . . assault and battery [are]”,<sup>207</sup> the view that corporate crime is not as harmful as other forms of crime has been eroded in recent times, particularly in Ireland since the onset of the economic crisis in 2007.<sup>208</sup> It is now widely perceived that corporate bodies have the capacity to cause substantial social harm.<sup>209</sup> Horan notes that, corporate actions frequently result in grievous wrongs and social harm across a number of different contexts including damage to the environment, injury to employees in the workplace, or causing financial loss from fraudulent conduct.<sup>210</sup>

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<sup>206</sup> See, Feinberg *The Moral Limits of the Criminal Law, Vol 1: Harm to Others* (OUP 1984).

<sup>207</sup> Sutherland, “Is ‘White-Collar Crime’ Crime?” (1945) 10 *American Sociological Review* 132, at 138.

<sup>208</sup> For a more detailed discussion see McGrath, “Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime” (2012) 22 *ICLJ* 72.

<sup>209</sup> Quaid, “The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis” (1998) 43 *McGill L J* 67, at 80.

<sup>210</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 5.

- 12.125 The potential for significant social harm from corporate risk became evident during the onset of the economic crisis in 2007 and the failings in the banking sector. Various crisis reports referred to the inability to adequately address risks in the banking sector during that time.<sup>211</sup> The Nyberg report specifically referred to inappropriate risk-taking in the banking sector in the lead up to the crisis, stating that there was a “general denial of the extent of accumulated risk until the very end”.<sup>212</sup> While failure to take appropriate measures to address risk was only one contributing factor to the crisis, the harm which resulted from the crisis had detrimental effects far beyond those engaged in commercial activity. Clarke J recently described the harm caused during the crisis in *The People (DPP) v O’Shea*, referencing the “extraordinarily severe consequences for many citizens of Ireland which flowed from the economic collapse”.<sup>213</sup>
- 12.126 Because of the social nature of the potential seriousness of the harm, such harm is arguably a public wrong. A public wrong cannot be remedied through compensation alone. One of the primary distinctions between civil law and criminal law is that crimes are considered a public wrong<sup>214</sup> and harmful public wrongs usually fall within the scope of the criminal law.
- 12.127 Reckless risk-taking in corporate bodies outside of the banking sector or financial institutions also has the potential to cause significant social harm by damaging the economy as whole. This potential public harm was outlined by Walker J in the English case of *Re Oasis Merchandising Services Ltd*, when he stated that wrongful trading “is likely to have wide-ranging consequences, such as the creditors of the company not being able to pay their creditors and so on, thereby causing a chain reaction of insolvency”.<sup>215</sup> This chain reaction of insolvency can cause widespread harm.<sup>216</sup>
- 12.128 Where companies have many creditors and owe sizeable debts to each, it is clear that engaging in reckless risk-taking can result in serious harm, beyond the direct loss suffered by the creditors. The fact that separate legal personality can facilitate and even incentivise such risk-taking, presents a problem for the law. Given the culpability demanded of a defendant by recklessness under Irish law, the wrongful conduct involved in reckless trading (reckless operational risk-taking), and the public and serious nature of the harm to the individual creditors in question, and society more widely, the Commission considers

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<sup>211</sup> Houses of the Oireachtas, *Report of the Joint Committee of Inquiry into the Banking Crisis* (2016); Regling and Watson, *A Preliminary Report on The Sources of Ireland’s Banking Crisis*, PUB00168. See also, the Honohan Report, *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008*, May 2010, PUB00075.

<sup>212</sup> Nyberg Report, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland: Report of the Commission of Investigation into the Banking Sector in Ireland* (2011) at paragraphs 2.11 and 4.94.

<sup>213</sup> *The People (Director of Public Prosecutions) v O’Shea* [2017] IESC 41, at paragraph 2.3.

<sup>214</sup> Ormerod, *Smith and Hogan’s Criminal Law* 12th ed (OUP 2008), at 10.

<sup>215</sup> *Re Oasis Merchandising Services Ltd* [1995] BCC 911, at 918.

<sup>216</sup> Konstantinov, “Wrongful Trading: Comparative Approach” (2015) 2(1) *Brics Law Journal* 100, at 106.

that certain instances of reckless trading can be sufficiently harmful to warrant criminalisation.

## 7. Deterring reckless trading

12.129 The discussion of civil provisions on reckless trading highlights that one of the primary goals of legislation on reckless or wrongful trading is to serve as a deterrent.<sup>217</sup> As discussed previously, enforcement difficulties mean that civil law remedies can be ineffective. As effective deterrence is dependent on there being a credible threat of enforcement,<sup>218</sup> difficulties in enforcing a civil provision that is based on personal liability will undermine that provision's deterrent effect. In addition to a criminal penalty being justified on the grounds that reckless trading involves conduct resulting in potentially serious harm, which must be culpably perpetrated, a further justification for criminalising reckless trading is to ensure effective deterrence of reckless operational risk-taking, thereby reducing the likelihood of harm resulting to creditors, and society more widely.

12.130 One of the most important functions of criminal law is to deter certain types of undesirable conduct.<sup>219</sup> Theories of deterrence operate on the basis that by imposing a penalty for certain conduct, there will be less of that conduct in the future and that criminal punishment can be justified if it leads to the prevention of future crime.<sup>220</sup> Deterrence may be general or specific. Specific deterrence is aimed at ensuring the individual offender will not reoffend. General deterrence is premised on the assumption that punishment, if sufficiently severe, will deter others from engaging in similar misconduct.<sup>221</sup> While the civil law and the criminal law can both serve to deter, the criminal law has a unique ability to punish with custodial sentences (as well as with financial penalties – criminal fines - though similar, but distinct, financial penalties can also be issued civilly – see Chapter 3) and to denounce certain actions through public censure resulting in significant moral opprobrium<sup>222</sup> (though public censure can also form a part of a civil/administrative law response to wrongdoing – see Chapter 4). These elements, alongside the public enforcement of criminal offences, significantly increase the criminal law's ability to generate deterrent effects when compared against the civil law, due to the credible threat of the imposition of a potentially severe and public sanction.

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<sup>217</sup> Bachner, "Wrongful Trading – A New European Model for Creditor Protection" (2004) *European Business Organization Law Review* 293, at 297.

<sup>218</sup> Hanly, *An Introduction to Irish Criminal Law*, 3rd ed (Gill & Macmillan 2016) at 23.

<sup>219</sup> Goddard, "Corporate Personality – Limited Recourse and its Limits" in Grantham and Rickett (eds), *Corporate Personality in the 20th Century* (Hart 1998) at 41.

<sup>220</sup> Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes and Noble, 1980) at 26.

<sup>221</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016), at 36.

<sup>222</sup> *In the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 IR 321, at 373.

- 12.131 Deterrence can work particularly well where decisions tend to be thought through over time. Financial or corporate crime is rarely committed impulsively, and usually requires planning and prior evaluation of probable costs and benefits of engaging in certain behaviour.<sup>223</sup> Regarding corporate criminal conduct, decisions in companies are often the product of deliberate processes, which take into account the probability of personal sanction of individuals.<sup>224</sup> The fear of punishment, in the context of deliberate decision-making, is likely to deter wrongdoing. The criminal law has the most onerous sanctions and is the most forceful method of communicating a message to corporate managers about the risks and penalties of a given behaviour.<sup>225</sup> As O'Malley notes, the threat of punishment does deter and it is implausible to suggest otherwise.<sup>226</sup>
- 12.132 In the aftermath of the global financial crisis, the UK Government and Parliament commissioned several reports analysing UK banking failures that made a number of recommendations for reform.<sup>227</sup> One of these reports, the *Consultation Paper on Sanctions for the Directors of Failed Banks*,<sup>228</sup> recommended the introduction of a criminal offence based on recklessness in the management of a bank. Arguably, it would make bank directors think twice before taking certain decisions or slow down the decision making process in order to, for example, take legal advice.<sup>229</sup> These reports ultimately led to the criminal offence of "causing a financial institution to fail" included in section 36 of the UK *Financial Services (Banking Reform) Act 2013*, discussed further, below. As was noted in the Issues Paper,<sup>230</sup> the former Governor of the Central Bank of Ireland suggested in 2015 that the *Financial Services (Banking Reform) Act 2013* "could be usefully mirrored in Ireland" as a means of tackling "egregious recklessness in risk-taking" in financial undertakings.<sup>231</sup>

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<sup>223</sup> O'Malley, *Sentencing Law and Practice* 3rd ed (Round Hall 2016) at 45.

<sup>224</sup> Weissmann and Newman, "Corporate Criminal Liability" (2007) 82 *Indiana L J* 411, at 428.

<sup>225</sup> Bauer, "Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just that Right?" (2004) 16 *Loyola Consumer Law Review* 303, at 307.

<sup>226</sup> O'Malley, *Sentencing Law and Practice* 3rd edn (Round Hall 2016) at 37.

<sup>227</sup> See in particular: HM Treasury, *Consultation Paper: Sanctions for the Directors of Failed Banks* (2012); HM Treasury *Summary of Consultation Responses to Sanctions for the Directors of Failed Banks* (2013); *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards* (2013); and HM Treasury *The Government's Response to the Parliamentary Commission on Banking Standards* (2013).

<sup>228</sup> HM Treasury, *Sanctions for the Directors of Failed Banks* (Consultation Paper 2012).

<sup>229</sup> *Ibid* at 14.

<sup>230</sup> Law Reform Commission, *Issues Paper on Regulatory Enforcement and Corporate Offences* (LCR IP 8 - 2016) at 136.

<sup>231</sup> Remarks by Governor Patrick Honohan prepared for the session "Politics by Other Means? Eurozone Institutions and National Sovereignty in the Bank Bailout Negotiations" at the Annual Conference of the Institute for New Economic Thinking (INET), Liberté, égalité, fragilité, Paris, 9 April 2015.

- 12.133 Deterrence in corporate criminal law depends not only on the fear of punishment, but also the significant stigma<sup>232</sup> and public condemnation<sup>233</sup> attached to being censured by the criminal law. The ability to censure is a central feature of the criminal law<sup>234</sup> and denunciation of a specific conduct may significantly promote its deterrent effect.<sup>235</sup> The importance of the public censure aspect of the criminal law, in the context of deterrence of corporate crime, has been previously emphasised by the Commission: “[d]eterrence can be reinforced by public censure. A clear public condemnation of an action can result in animosity towards the offender within the community. Others may be deterred from engaging in the prohibited action by the threat of bringing such stigma on themselves. This is particularly acute in the context of a commercial corporation”.<sup>236</sup>
- 12.134 A significant risk of introducing a deterrent effect in reckless trading, however, is the possibility of introducing a so-called “chilling effect”. The application of legal measures with strong deterrence objectives may influence the market to become significantly more risk-averse. This could occur either where the ambit of the offence is deliberately wide (in which case market actors will *know* that they will be criminalised in a wide variety of circumstances), or where the ambit of the offence is too vague to determine (in which case, market actors may *believe* or *fear* that they will be subject to criminal sanction in a wide variety of circumstances). As deterrence is focused on ultimately modifying the behaviour of the class of people targeted by the legislation, both of these outcomes are effectively equivalent. Both would result in a chilling effect, compelling the market to adopt a significantly more risk-averse attitude.
- 12.135 Were legislation to cause such a chilling effect through an overbroad deterrence regime, the consequences could be very detrimental to the proper functioning of corporate life in Ireland. A criminal offence of reckless trading runs the risk of focusing a court’s analysis on risky trading. An alternative way of limiting the scope of a criminal offence in this context, while keeping it applicable to the undesirable conduct, is to examine whether other criminal offences might possibly cover the same sets of facts. It is the Commission’s view that fraud offences, suitably modified, are an appropriate substitute in this regard. Such offences do not, in their definitions, place so much emphasis on riskiness and corporate trading. The Commission returns to this proposal below.

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<sup>232</sup> Ormerod, *Smith and Hogan’s Criminal Law* 12th edn (OUP 2008) at 12.

<sup>233</sup> Hanly, *An Introduction to Irish Criminal Law* 2nd edn (Gill & Macmillan 2006) at 22.

<sup>234</sup> Ashworth “Is the Criminal Law a Lost Cause?” (2000) 116 LQR 225, 236.

<sup>235</sup> See, Gross, *A Theory of Criminal Justice* (OUP 1979) at ch 9.

<sup>236</sup> The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26–2003) at 2.

## 8. Accountability and public enforcement

12.136 Compared with civil remedies, one of the advantages of criminal enforcement is that it can more effectively hold officers to account,<sup>237</sup> which is not generally the aim of the civil law. Accountability for culpable conduct causing harm is generally the function of the criminal law, assuming that conduct is sufficiently serious that a criminal penalty can be justified. The Commission has previously observed that the existence of corporate criminal liability is important to render corporations and the persons who control them accountable for wrongful activity.<sup>238</sup> Horan agrees, stating that an important objective of the criminal law is to punish those who are guilty of blameworthy conduct that results in grievous wrongs.<sup>239</sup> The importance of imposing accountability for wrongful trading (the UK equivalent to civil liability for reckless trading) was expressed by Walker J in the English and Welsh case of *Re Oasis Merchandising Services Ltd*:

“It is not in the public interest to permit directors to get away scot free when they have engaged in wrongful trading....the public is interested in companies being managed properly for a number of reasons, such as to instil confidence in the market, provide protection for stakeholders, enhance commercial morality. The public has legitimate expectations that those involved in managing companies will act properly and if they do not then they should be penalised.”<sup>240</sup>

12.137 Any argument that a law will hold culpable actors accountable or act as a deterrent, assumes that there is a real possibility of enforcement. Coffee has argued that enforcement of a law matters much more than even its substantive content.<sup>241</sup> In other contexts, it has been argued that a primary benefit of public enforcement could well improve deterrence.<sup>242</sup>

12.138 Public enforcement through the criminal law will have several advantages when compared to private enforcement under the civil law. Public enforcement agencies taking actions will not be dependent upon providing a tangible financial benefit to the person wronged. Therefore, the personal financial position of a corporate manager who has traded recklessly becomes an irrelevant factor in public enforcement. The potential for high costs will still be a consideration for public enforcement agencies, but will not have as big an effect as on private actors.

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<sup>237</sup> Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at 1108.

<sup>238</sup> The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26–2003) at 2.

<sup>239</sup> Horan, *Corporate Crime* (Bloomsbury Professional 2011) at 5.

<sup>240</sup> *Re Oasis Merchandising Services Ltd* [1995] BCC 911, at 918.

<sup>241</sup> Coffee, “Law and the Market: The Impact of Enforcement” (1997) 156 U Penn L Rev 229, at 233.

<sup>242</sup> Jackson and Roe, “Public and Private Enforcement of Securities Laws: Resource Based Evidence” (2009) 93 *Journal of Financial Economics* 207, at 208.

## 9. Conclusions

12.139 The Commission considers that there have been limitations in the efficacy of existing civil provisions for reckless trading. These have been described above and are reflected in the commentary on how these provisions have worked and how analogous provisions have functioned in other jurisdictions.

12.140 However, the Commission is of the view that a specific reckless trading offence would be too difficult to make workable. It faces some substantial practical difficulties, such as determining from which creditor's perspective the substance and lack of justification of the risk is to be determined. Furthermore, and of perhaps greatest significance, the aim of deterrence would be difficult to pursue without introducing so strong a deterrent as to have a chilling effect on corporate risk-taking. As argued above, the Commission recognises the importance of such risk-taking to corporate and economic activity. It is difficult to preserve fully the scope for company officers to engage in this kind of beneficial activity while adequately restricting their scope to engage in irresponsible risk-taking to the detriment of creditors.

12.141 The Commission, therefore, ultimately considers that reform by way of introducing a specific offence of reckless trading to the *Companies Acts* is not desirable. However, many of the cases that would be caught under the ambit of such an offence can alternatively be prosecuted under fraud offences. The criminal offence of fraudulent trading under the *Companies Act 2014* is of significance in this respect.<sup>243</sup> The more general fraud offences under the *Criminal Justice (Theft and Fraud Offences) Act 2001* are also applicable.

12.142 It was observed earlier in the chapter that the difference between reckless operational risk-taking and fraud is the lack of intentional deception that an offence of reckless trading would require. Currently, fraud offences under the 2001 Act require a fault element of intention in order for a prosecution to be successful. However, the Commission recommends in Chapter 11 that the fault element of these offences should be widened to include recklessness. If the scope of the offences was broadened in this way, it would criminalise the category of cases that the Commission considers may merit criminalisation. This would achieve the aim of deterring undesirable behaviour, while keeping the focus on a fraud analysis rather than the difficult demarcation of the appropriate level of risk-taking in a corporate context. This approach would secure many of the benefits of criminalisation described in this chapter, while mitigating the risk of a chilling effect constraining beneficial corporate risk-taking.

**R 12.01 The Commission recommends that egregiously reckless risk-taking should be appropriately criminalised by the inclusion of recklessness (which has been defined as**

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<sup>243</sup> Section 722 of the *Companies Act 2014*. This is a successor provision to section 297 of the *Companies Act 1963*.



subjective recklessness) within the offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001* as recommended in Chapter 11, above.

**R 12.02** The Commission recommends that, having regard to the recommendations in Chapter 11 concerning recklessness, a criminal offence of reckless trading should not be enacted in Ireland.



## CHAPTER 13

# VENUE FOR TRIALS ON INDICTMENT FOR CORPORATE OFFENCES

## A. Introduction

13.01 This chapter considers the issue of the proper court in which criminal offences under regulatory legislation should be tried. It is important to note at the outset that the scope of the chapter is restricted to trials on indictment specifically; that is, trials in which the accused is entitled to a jury as of right.<sup>1</sup> All generic references to “offences” or “crimes” should therefore be taken to mean indictable offences only, unless otherwise specified.

13.02 The chapter examines two issues in relation to such offences:

(1) At which court should a trial begin (i.e., should the current jurisdiction of the Central Criminal Court<sup>2</sup> be extended to cover other crimes)?

(2) Should there be an expanded system allowing for the transfer of trials between courts? If so, what courts should be eligible for transfers, and what standards should be applied to these transfers?<sup>3</sup>

13.03 Many possible systems can be achieved by varying the order of the answers to these questions. One could have a highly granular answer to the first question as to where a trial should begin, and then have no system (or a highly restrictive system) for transfer between courts. Alternatively, one could have a very roughshod approach to the question of where a case should be initially returned for trial, but a highly refined transfer system.

13.04 At present, Ireland has neither of these. Both the system for determining initial trial venue and the system for determining transfers between trial venues are quite coarse. This chapter seeks to critically analyse these systems and examine potential avenues for

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<sup>1</sup> Hunt, *Hunt and Murdoch's Dictionary of Irish Law* 6th ed (Bloomsbury 2016) at 856.

<sup>2</sup> This is the name given to the High Court when exercising its criminal jurisdiction: section 11 of the *Courts (Supplemental Provisions) Act 1961*.

<sup>3</sup> The Commission has previously suggested that the current transfer provisions should be retained: *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010) at paragraphs 2.65-2.68. It was noted there that the suggestions of the 2003 Working Group were under consideration by Government; however, that consideration does not seem to have as yet (September 2018) resulted in any reform. It should also be noted that the concern in the 2010 Report was with trials from the Central Criminal Court being sent to the Circuit Court. The issues raised in this chapter are mostly (though not exclusively) concerned with the inverse scenario.

reform to guarantee the administration of justice in criminal trials, particularly trials of high-profile economic crimes that can both catch the public eye significantly and often involve complex, lengthy trials.

## **B. The Relevance of Location**

13.05 The location in which a trial occurs might matter for both practical and principled reasons. Practical concerns in this context relate to the efficient running of the trial and general prosecutorial process. Principled concerns reflect more broadly on the role of the courts in administering justice and the public perception of that role in high profile cases.

13.06 The following subsections outline some issues that might arise under each of these kinds of argument. These are treated relatively uncritically at first pass, with the substantive evaluation of the case for reform being made later in the chapter.

### **1. Practical Issues**

13.07 On a practical level, it matters that the parties to the trial have reasonable access to the court, that the court has proper powers and processes to investigate the matter before it, and that it can bring to bear the expertise required to adjudicate properly the issues raised at trial. The costs associated with a court are also relevant; trials in the Superior Courts are in general more expensive.

13.08 More local access to the court is greater in the Circuit Court as opposed to the Central Criminal Court. The Circuit Court tries the defendant in the venue most local to them,<sup>4</sup> whereas the Central Criminal Court almost always sits in Dublin (though in some instances it sits outside Dublin). Although there is an opportunity for transfer from any other Circuit to the Dublin Circuit, the test is somewhat restrictive and limiting. The test to be met is that it would be “manifestly unjust” not to transfer the case.<sup>5</sup> This test is considered in more detail below, where it will become apparent that transfers between Circuits are not easily achieved.

13.09 It is important to note that, on these practical grounds, the Circuit Court has shown itself highly capable in dealing very effectively with a heavy criminal case load, including as the trial venue for the corporate-related trials on indictments related to the banking collapse that emerged in 2008. It disposes of thousands of trials on indictment annually, whereas the Central Criminal Court disposes of in the region of 200 annually. There can be no doubt, therefore, the Circuit Criminal Court disposes of the most trials on indictment in Ireland.

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<sup>4</sup> Section 25(3) of the *Courts (Supplemental Provisions) Act 1961*.

<sup>5</sup> Section 32 of the *Courts and Court Officers Act 1995*.

## 2. Issues of Principle

- 13.10 On a principled level, there may be a perception of greater weight and opprobrium attaching to matters pursued in higher courts. This is most obviously the case with the crimes currently reserved to the Central Criminal Court for trial at first instance, which includes murder, rape, treason, piracy, and genocide. It therefore seems that there is at least some connection between the seriousness of a crime and the seniority of the court that tries it.<sup>6</sup>
- 13.11 Offences are classified by their mode of trial (summary or on indictment), rather than a direct assessment of their seriousness. The old felony/misdemeanour distinction attempted to capture the relative seriousness of certain crimes, but the distinction evolved inconsistently, and was gradually replaced by the summary/indictable distinction.<sup>7</sup> A summary offence is one that is triable only summarily; that is, only by the court of statutory summary jurisdiction, which is the District Criminal Court.<sup>8</sup> Trial on indictment before judge and jury may be carried out only in the Circuit or Central Criminal Courts.
- 13.12 Capturing the seriousness of a particular incidence of crime only by reference to the definition of that crime in the abstract is a proxy measure. The circumstances surrounding the commission of a crime can have an impact on how serious of a breach of community norms it involves. In other words, the severity of crime can vary on at least two dimensions: the severity of the type of crime at issue, and the severity of the particular instance of that crime. Murder is more serious than assault, a fraud of €1bn is more serious than fraud of €1,<sup>9</sup> A riot involving 100 people is more serious than a riot involving the minimum of 12.<sup>10</sup>
- 13.13 In an attempt to capture this nuance, indictable offences are divided into three categories. First, there is a limited group of offences triable only on indictment (which are inherently serious). Second, so-called ‘either-way’ offences, which are certain prescribed offences triable on indictment *or* summarily subject to certain requirements.<sup>11</sup> However, most

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<sup>6</sup> This view would also be supported by Carney J, who lamented in 1999 that the lack of jurisdiction for the Central Criminal Court to try serious fraud cases was indicative of the unimportance of such crimes: Coulter, “Judge Wants Jurisdiction to Try Major Fraud Cases” *Irish Times* (22 October 1999). It is also a view that emerges from Minister for Justice Gerry Collins TD’s speeches in the Seanad regarding the transfer of rape from the jurisdiction of the Circuit Court to the Central Criminal Court: *Seanad Debates* 121 (15 December 1988) at 1480.

<sup>7</sup> Walsh, *Walsh on Criminal Procedure* 2nd ed (Roundhall 2016) at paragraphs 1-56 and 1-57.

<sup>8</sup> Sections 77A and 77B of the *Courts of Justice Act 1924*; section 2 of the *Criminal Justice Act 1951*. See also the analysis of Geoghegan J in *Gormley v Smyth* [2010] IESC 5, [2010] 1 IR 315.

<sup>9</sup> Of course, the difference in seriousness of fraud is accommodated by the *Criminal Justice (Theft and Fraud Offences) Act 2001*. Section 53 of that Act provides that any offence under the Act may be tried summarily.

<sup>10</sup> Section 14 of the *Criminal Justice (Public Order) Act 1994*. Though the level of responsibility of any one individual in the riot is not increased. The seriousness of the riot is an aggregation of individual responsibilities that are (all other things held equal) more or less equivalent.

<sup>11</sup> These offences are listed in schedule 1 of the *Criminal Justice Act 1951*.

statutory offences, including corporate offences, fall into a third so-called “hybrid” category, in which the prosecution has a wide choice to prosecute either summarily or on indictment and where the seriousness of the offence is dependent on that choice. Regardless of which of these methods of trial is ultimately employed, the second and third categories share a “hybrid” character, as this refers to the capacity of the crime to be tried summarily or on indictment, not the actuality of it being tried in either of those modes in any particular instance.<sup>12</sup> One of the more significant effects of this is that indictable offences are not subject to the time limitations applicable to summary prosecutions under section 10(4) of the *Petty Sessions (Ireland) Act 1851*.<sup>13</sup>

- 13.14 The fact that more serious crimes are tried in higher level courts is, at least in part, a function of the legal aphorism that it is not enough that justice be done; justice must be *seen* to be done.<sup>14</sup> Ordinarily that principle is cited in connection with tests for judicial bias, but the rationale that underpins it is more general: it is concerned with the perception of the courts by the public. In administrative law cases, the concern is that the public perceives the courts as being *fair*. However, there are other ways in which the public might judge the performance of the courts. In the context of this chapter specifically, there is a concern that the public perceives the trial of crimes in higher courts as reflecting a commitment from the State, and judicial branch specifically, to allocate due institutional weight and gravity to certain deviations from community standards.
- 13.15 For either-way or hybrid offences, there are two tiers of court that the offence can be tried in: the District Court for lower-end offending, and the Circuit Court for high-end offending. At present, the Central Criminal Court does not add a third tier to this structure (or a second tier for offences that are triable only on indictment).
- 13.16 It bears stressing that even if the somewhat lofty and intangible “expressive”<sup>15</sup> value of higher courts trying more serious crimes on principle holds, it will still have to be justified on balance against the practical difficulties that a trial might experience in the Central

<sup>12</sup> Walsh, *Walsh on Criminal Procedure* 2nd ed (Roundhall 2016) at paragraphs 1-57 to 1-59. This is well-established in case law: *Dillon v McHugh* [2013] 1 IR 430, at paragraph 32; *Director of Public Prosecutions (Murphy) v G (a minor)* [2009] 3 IR 410, at paragraph 24; *Director of Public Prosecutions (O'Brien) v Timmons* [2004] IEHC 423, [2005] 4 IR 545, at 552; *TDI Metro v Delap (No 2)* [2000] 4 IR 520, at 527; *Director of Public Prosecutions v Logan* [1994] 3 IR 254, at 260; *McGrail v District Justice Ruane* [1990] 2 IR 555, at 557.

<sup>13</sup> See further: *Director of Public Prosecutions (O'Brien) v Timmons* [2004] IEHC 423, [2004] 4 IR 545.

<sup>14</sup> *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233. This principle is well established in Irish administrative law in the test for bias: *P(A) v Judge McDonagh* [2009] IEHC 316, at paragraph 6.1; *O'Callaghan v Mahon* [2007] IESC 17, [2008] 2 IR 514, at 550 and 670; *Bula Ltd v Tara Mines (No 6)* [2000] 4 IR 412, at 413; *Carroll v Law Society* [2000] 1 ILRM 161; *Bane v Garda Representative Association* [1997] 2 IR 449; *Dublin Wellwoman Centre v Ireland* [1995] 1 ILRM 408, at 421; *O'Neill v Beaumont Hospital Board* [1990] ILRM 419, at 438.

<sup>15</sup> Feinberg, “The Expressive Function of Punishment” (1965) 49 *The Monist* 397.

Criminal Court. In other words, principled concerns of themselves are insufficient to justify reform in this area.

## C. The Current System for Determining Jurisdiction

13.17 As mentioned above, at present the court in which a trial originates is determined by the category of crime into which the offence falls. The categorisation system for this purpose is purely definitional; it is determined rigidly by a classificatory designation of the crime at issue; specifically, whether that crime is to be tried on indictment or summarily. This system has no ability to take into account other qualitative criteria such as the severity of the offence, gravity of the harm caused, convenience to witnesses, etc.

13.18 The current list of crimes which are tried at first instance in the Central Criminal Court includes:

- (1) Treason;<sup>16</sup>
- (2) Certain offences against the state;<sup>17</sup>
- (3) Murder (and attempt/conspiracy to murder);<sup>18</sup>
- (4) Piracy;<sup>19</sup>
- (5) Genocide;<sup>20</sup>
- (6) Rape, aggravated sexual assault (and inchoate/secondary liability variants of the latter);<sup>21</sup>
- (7) Certain competition offences;<sup>22</sup>
- (8) Certain maritime offences;<sup>23</sup>
- (9) Certain torture offences;<sup>24</sup>

<sup>16</sup> Section 25(2) of the *Courts (Supplemental Provisions) Act 1961*; sections 2 and 3 of the *Treason Act 1939*.

<sup>17</sup> Section 25(2) of the *Courts (Supplemental Provisions) Act 1961*; sections 6-8 of the *Offences Against the State Act 1939*.

<sup>18</sup> Section 25(2) of the *Courts (Supplemental Provisions) Act 1961*.

<sup>19</sup> Section 25(2) of the *Courts (Supplemental Provisions) Act 1961*.

<sup>20</sup> Section 2(4) of the *Genocide Act 1973*.

<sup>21</sup> Section 10 of the *Criminal Law (Rape) (Amendment) Act 1990*.

<sup>22</sup> Section 11 of the *Competition Act 2002*.

<sup>23</sup> Section 7(2) of the *Maritime Security Act 2004*.

<sup>24</sup> *Criminal Justice (United Nations Convention against Torture) Act 2000*.

(10) Certain offences under the Geneva Conventions.<sup>25</sup>

13.19 All other indictable offences are returned for trial to the Circuit Criminal Court. This situation arises by virtue of section 4(1) of the *Courts (Establishment and Constitution) Act 1961* (establishing the Circuit Court in its modern form) and section 25(1) of the *Courts (Supplemental Provisions) Act 1961*, which provides:

“[T]he Circuit Court shall have and may exercise every jurisdiction as respects indictable offences for the time being vested in the Central Criminal Court...”

13.20 This effectively creates parity between the Central Criminal Court and the Circuit Court in terms of jurisdiction. However, certain offences are then reserved to the Central Criminal Court in section 25(2) by making them specific exceptions to this parity.<sup>26</sup> These exceptions are what generate the list, given above, of the crimes tried at first instance in the Central Criminal Court.

13.21 It might once have been thought that such an arrangement could be constitutionally suspect, to the extent that the Circuit Court might be taken to oust the jurisdiction of the High Court. Under Article 34.3.1° of the Constitution, the High Court has full original jurisdiction, which extends to jurisdiction to hear and determine any criminal matter:

“The courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.”<sup>27</sup>

13.22 It could once have been arguable that this constitutional provision might threaten a legislative scheme under which the Central Criminal Court was effectively denied the opportunity to try certain crimes, as one might argue it is under a system where the Circuit Court is established as having equal jurisdiction with the Central Criminal Court with only a few exceptions. There have occasionally been statements from judges that could have been adopted in support of this sort of argument. Take, for instance, the following statement of Gannon J in *R v R*:

“From the amplitude of jurisdiction with which the High Court is invested by Article 34 of the Constitution, it follows that the Oireachtas does not add to or increase the jurisdiction of the High

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<sup>25</sup> *Geneva Conventions Act 1962*.

<sup>26</sup> “The jurisdiction conferred on the Circuit Court by subsection (1) of this section shall not extend to treason, an offence under section 2 or 3 of the *Treason Act 1939*, an offence under section 6, 7 or 8 of the *Offences Against the State Act 1939*, murder, attempt to murder, conspiracy to murder, or piracy, including an offence by an accessory before or after the fact.”

<sup>27</sup> This article must also be read alongside Article 34.3.4°: “The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.”



Court by legislation. It follows also that the Oireachtas cannot create validly, in accordance with the Constitution, a new juridical jurisdiction and withhold it from the High Court; nor can it reduce, restrict or terminate any jurisdiction of the High Court.”<sup>28</sup>

13.23 It would have been strained, but possible, to argue that the Oireachtas created a statutory jurisdiction in the 1961 Act that mirrored that of the High Court, but from which the High Court was precluded.

13.24 This rather stringent hypothetical view is not the one that has actually emerged from the case law, however. The courts have interpreted the provisions on jurisdiction in Article 34 somewhat flexibly. Several provisions that determine the jurisdiction of lower courts have been unsuccessfully challenged on the basis of Article 34.3.1°. In *State (Boyle) v Neylon*, the Supreme Court held that the major defining characteristic of the Superior Courts was their constitutional review function.<sup>29</sup> This could not be assigned to a court that had its basis in statute, and it cannot be taken from the Superior Courts as established in the Constitution. This suggests a view that functions unrelated to constitutional review could validly be assigned to other courts, potentially even exclusively.

13.25 In *Tormey v Ireland*, the Supreme Court considered a challenge to section 31 of the Courts Act 1981.<sup>30</sup> This case contains a very important statement by Henchy J on the interaction between a Circuit Criminal Court with jurisdiction to try all criminal trials on indictment (subject to the exceptions reserved to the Central Criminal Court) and the Central Criminal Court:

“The ‘full’ original jurisdiction of the High Court [. . .] must be deemed to be full in the sense that all justiciable matters and questions [. . .] shall be within the original jurisdiction of the High Court in one form or another. If [. . .] Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High Court. [. . .] In this context the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked - in proceedings such as *habeas corpus, certiorari, prohibition, mandamus, quo warranto*,

<sup>28</sup> *R v R* [1984] IR 296, at 308.

<sup>29</sup> *State (Boyle) v Neylon* [1986] IR 551, at 555.

<sup>30</sup> *Tormey v Ireland* [1985] IR 289.

injunction or a declaratory action - so as to ensure that the hearing and determination will be in accordance with law.”<sup>31</sup>

- 13.26 This suggests that significant reduction in the substantive trials the High Court hears at first instance is permissible, so long as that court remains capable of undertaking judicial review of the decision, awarding certain ancillary orders, or undertaking collateral review of the judgment. It therefore seems that Article 34 guarantees that the High Court must have at least *some* possibility of involvement in any judicial matter, but it need not be through the specific vehicle of first instance trial.
- 13.27 The current system of having the vast majority of criminal matters tried at first instance in the Circuit Court seems, therefore, to be perfectly permissible under Article 34. It was also noted earlier that the Circuit Court manages to process a very large case load, whereas the Central Criminal Court hears a much smaller proportion of criminal cases. Were the criminal jurisdiction of the Central Criminal Court expanded significantly, it would only stretch further already thin High Court resources. Therefore, not only is there no constitutional impetus to return more criminal jurisdiction to the High Court, there would be practical difficulties with such a system as well.
- 13.28 The next section, and the remainder of this chapter generally, will consider the merits of expanding the scope of transfers between the Circuit Court and Central Criminal Court.

## D. Transferring between Courts

- 13.29 This section considers two issues: (1) transfer of jurisdiction between Circuit Courts, and (2) transfer of jurisdiction from the Circuit Court to the Central Criminal Court.

### 1. Transferring from One Circuit to Another

- 13.30 As mentioned above, the current statutory test for transfers between Circuit Courts is set out in section 32 of the *Courts and Court Officers Act 1995*:

“Where [the accused] has been sent forward for trial to the Circuit Court, sitting other than within the Dublin Circuit, the judge of the Circuit Court before whom the accused is triable may, on the application of the prosecutor or the accused, if satisfied that it would be manifestly unjust not to do so, transfer the trial to the Circuit Court sitting within the Dublin Circuit[.]”

- 13.31 The likelihood of a court recognising the requisite “manifest injustice” for this section to apply appears low. This is arguably a higher standard than having to prove “a real risk of an unfair trial”, which is required to have a prosecution stayed or prohibited due to

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<sup>31</sup> *Tormey v Ireland* [1985] IR 289, cited with approval in *Omega Leisure Ltd v Barry* [2012] IEHC 23, at paragraph 3.5.

adverse publicity. In *Rattigan v Director of Public Prosecutions*,<sup>32</sup> regarding the risk of an unfair trial due to adverse publicity, the Supreme Court noted that:

“[A] court will only stop a trial if it is satisfied that the normal safeguard procedures in a trial, including the making of appropriate directions, will not, in fact, achieve a fair trial. In practice, this will rarely be the case...”<sup>33</sup>

13.32 There is, therefore, an aversion to the use of statutory procedures that deviate exceptionally from ordinary trial procedure. If it is rarely done in the context of a “real risk of an unfair trial”, it seems highly unlikely that the standard of a “manifest injustice” would be met in all but the rarest of cases.

## 2. Transferring from Circuit Court to Central Criminal Court

13.33 The jurisdiction to transfer a trial between the Circuit Criminal Court and the Central Criminal Court has undergone several iterations in Ireland. This section traces this development up to the arrangement that currently prevails under the *Courts and Court Officers Act 1995*.

### (a) The 1924 System

13.34 The first provision for transfer was section 54 of the *Courts of Justice Act 1924*:

“[T]he Attorney-General or the accused person shall be entitled on application to have any case, the maximum penalty in which exceeds one year’s imprisonment or five years’ penal servitude, sent forward to a court of the High Court Circuit<sup>34</sup> or to the Central Criminal Court.”

13.35 Notably, this section establishes an entitlement to a transfer that is irrefutable if the (rather lax) conditions are met. Either the accused or Attorney General could simply make an application to the Circuit Court that, if made with 7 days’ notice, effectively required the Circuit Court judge to allow it.<sup>35</sup> Only where the notice period was less than 7 days was the judge left with discretion to allow or refuse the application.<sup>36</sup>

13.36 However, an important restriction in this provision, which would be eroded in later legislation, is that it can only apply where the maximum penalty applicable was greater than a year’s imprisonment or 5 years’ penal servitude. Given that seriousness of penalty corresponds with seriousness of criminal infraction, this placed some limit on the provision. Maximum penalties are proxy measure for the seriousness of a crime, so the

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<sup>32</sup> [2008] 4 IR 639.

<sup>33</sup> [2008] 4 IR 639, at paragraph 52.

<sup>34</sup> This court was abolished by section 1 and schedule 1 of the *Courts (Supplemental Provisions) Act 1961*.

<sup>35</sup> Section (1)(a) of the *Courts of Justice Act 1924*.

<sup>36</sup> Section (1)(b) of the *Courts of Justice Act 1924*.

effect of this further restriction is that a transfer could only be made in cases that were sufficiently serious.

**(b) The 1964 System**

13.37 Section 6 of the *Courts Act 1964* repealed section 54 of the 1924 Act, and replaced it with an even more flexible mechanism:

“[W]here [an accused] charged with an indictable offence is sent forward for trial to the Circuit Court, an application by the Attorney General or the accused to the judge of the Circuit Court before whom the accused is triable to have the trial transferred to the Central Criminal Court shall—

(a) in case the party making the application, not less than seven days before making it, notified the accused or the Attorney General, as the case may be, of the application, be granted, and

(b) in any other case, in the discretion of the judge, be either granted or refused, and the decision to grant or refuse the application shall be final and unappealable.”

13.38 The 2003 *Report of the Working Group on the Jurisdiction of the Courts* noted that this provision was open to abuse and was in fact abused.<sup>37</sup> It replicated the 1924 Act but without the limitations on maximum sentence. It required a judge to transfer a trial to the Central Criminal Court, provided the application for transfer was made giving 7 days’ notice to the other party.

13.39 The flexibility of this provision led to the Central Criminal Court being inundated with minor prosecutions.<sup>38</sup> This was plainly unsatisfactory.

**(c) The 1981 System**

13.40 Section 31 of the *Courts Act 1981* repealed and replaced section 6 of the 1964 Act:<sup>39</sup>

“(1) Subject to subsections (2) and (3) of this section where a person charged with an indictable offence (in this section referred to as “an accused”) is sent forward for trial to the Circuit Court sitting other than within the Dublin Circuit, an application by the prosecutor or the accused to the judge of the Circuit Court before whom the accused is

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<sup>37</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) at para 414.

<sup>38</sup> *Ibid*, citing the Committee on Court Practice and Procedure, *The Criminal Jurisdiction of the High Court* (Dublin Stationery Office 1966) at paragraph 23.

<sup>39</sup> This was the provision that was unsuccessfully challenged in *Tormey*.

triable to have the trial transferred to the Circuit Court sitting within the Dublin Circuit shall—

(a) in case the party making the application, not less than seven days before making it, notified the accused or the prosecutor, as the case may be, of the application, be granted, and

(b) in any other case, in the discretion of the judge, be either granted or refused, and the decision to grant or refuse the application shall be final and unappealable.”

13.41 This provision substantially mirrored its predecessor, with the exception that it provided that all transfers from circuits outside of Dublin were to be transferred to the Dublin Circuit Criminal Court rather than to the Central Criminal Court. Trials that commenced in the Dublin Circuit Court were not transferrable at all. This was the beginning of a regime under which there would be no possibility to transfer from the Circuit Court to the Central Criminal Court.

13.42 In *The State (Boyle) v Neylon*,<sup>40</sup> this provision was subject to an unsuccessful constitutional challenge. It was effectively argued that transfers between Circuit Courts deprived the jurisdiction of those courts of their “local and limited” character. The Circuit Court must be local and limited in order to comply with Article 34.3.4 of the Constitution. The material offences in this case were committed in Wicklow, but the trial was transferred to the Dublin Circuit Court under the procedure in section 31 of the 1981 Act described above. Holding a trial for an offence in a court outside of the locality of that offence could not, it was argued, be done by any court that was truly local and limited in character.

13.43 The Supreme Court rejected this contention. The Court held that the objective of Article 34.3.4 was to establish courts of local jurisdiction that were cheaper and more accessible, and the Oireachtas was free to see how this aim was met.<sup>41</sup> The Supreme Court also clarified that the Circuit Court was one national court, and not a collection of several distinct circuit courts differentiated by locality. Had the Dublin and Wicklow Circuit Courts been completely different courts, it would have been more difficult to argue that transfer of jurisdiction to the Dublin circuit did not deprive the Dublin Court of its local and limited character.

13.44 Since, however, the Circuit Court is one national court, its jurisdiction is conferred on its judges collectively, but it is exercised locally in accordance with statute.<sup>42</sup> This characterisation made it possible to characterise section 31 of the *Courts Act 1981* as a

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<sup>40</sup> [1986] IR 551.

<sup>41</sup> *Ibid* at 556-57.

<sup>42</sup> Section 25(3) of the *Courts (Supplemental Provisions) Act 1961*.

provision that simply allowed one judge of the Circuit Court to transfer the same jurisdiction they would have to one of their colleagues sitting in Dublin.

**(d) The 1995 System**

13.45 Section 32 of the *Courts and Court Officers 1995* replaced section 31 of the 1981 Act. Section 32(1) provides:

“Where a person (in this section referred to as “the accused”) has been sent forward for trial to the Circuit Court, sitting other than within the Dublin Circuit, the judge of the Circuit Court before whom the accused is triable may, on the application of the prosecutor or the accused, if satisfied that it would be manifestly unjust not to do so, transfer the trial to the Circuit Court sitting within the Dublin Circuit and the decision to grant or refuse the application shall be final and unappealable.”

13.46 Like its precursor, this provision allows only for transfers between circuits; specifically, it allows only transfers between circuits outside Dublin to the Dublin Circuit Court. The innovation in this section is to impose a more onerous standard on transfer applications. The test is now that it would be “manifestly unjust” to disallow the transfer.

13.47 This section was subject to an unsuccessful constitutional challenge in *Todd v Murphy*.<sup>43</sup> The applicant here sought to have his trial transferred from Cork to Dublin because his trial would be prejudiced by unfair publicity in Cork. This application was refused, and this refusal was challenged on the grounds that the decision of the judge was subject to no further appeal mechanism. The Supreme Court held that there was no general right of appeal either in the common law or in the Constitution. In line with the comments of Henchy J above in *Tormey*, so long as a decision remains subject to judicial review then there is no ouster of the Superior Courts’ constitutional jurisdiction.<sup>44</sup>

13.48 In the result, there is currently no system for transferring from the Circuit Court to the Central Criminal Court. A crime will be returned for trial in either the Circuit Criminal Court or the Central Criminal Court depending on a categorical system that is itself quite rigid. There is no scope for reassigning trial venues between these inflexible categories. Additionally, the categorical system itself has been described as arbitrary and “ripe for review”.<sup>45</sup> Sexual offences such as rape and aggravated sexual assault are allocated to the

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<sup>43</sup> [1999] 2 IR 1.

<sup>44</sup> *People (DPP) v Joel* [2016] IECA 120, at paragraphs 9 and 10.

<sup>45</sup> O’Malley, *The Criminal Process* (Roundhall 2009) at paragraphs 9.28 and 9.32.

Central Criminal Court,<sup>46</sup> whereas incest and defilement remain in the jurisdiction of the Circuit Criminal Court.<sup>47</sup>

13.49 In light of this, the remainder of this chapter considers reform proposals for this area of law. In particular, review of the transfer system (the current iteration of which is likely a response to harsh lessons under the 1964 system) seems apt.

## E. Possible Reforms

13.50 In its 2003 Report, the Working Group on the Jurisdiction of the Courts examined 6 models of potential reform of the current system.

(1) Retaining the 1995 system, but with additional resources allocated to the Central Criminal Court;

(2) Retaining the 1995 system, but allowing the Central Criminal Court to sit outside Dublin;<sup>48</sup>

(3) Retaining the 1995 system, but reconfiguring the classification of crimes that are to be returned to the Central Criminal Court for trial at first instance;

(4) Establishing a national criminal court;

(5) Conferring jurisdiction on the Circuit Criminal court for all indictable offences; and

(6) New arrangement for the transfer of cases between the Circuit Criminal Court and the Central Criminal Court.

13.51 The first three of these proposals are the least radical, in that all of them propose the retention of the 1995 system but suggest that it should be bolstered with some ancillary mechanism. The second of these reforms is one that has already effectively been implemented; the Central Criminal Court now holds sittings outside Dublin when necessary. This suggestion is unlikely to remedy the difficulties considered in this chapter.

13.52 Nor is the first reform option particularly appropriate to the issues considered in this chapter. Problems of proper venue for trial cannot simply be answered by the allocation of more resources to the Central Criminal Court.

13.53 The third suggestion is one that this chapter has treated as a conceptually separate question: the determination of initial venue, as opposed to the transfer procedures from

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<sup>46</sup> *Criminal Law (Rape) (Amendment) Act 1990*.

<sup>47</sup> *Criminal Law (Sexual Offences) Act 2006*; *Criminal Law (Sexual Offences) (Amendment) Act 2007*.

<sup>48</sup> Since the report of the Working Group on the Jurisdiction of the Courts was issued, the Central Criminal Court has established a practice of sitting outside of Dublin when required.

that venue. The fifth proposal also falls under this rubric. It was argued above that there is not much in the difference practically between trial in the Circuit Court and trial in the Central Criminal Court. Proposals for reform in this area, in the context of economic crime as considered in this Report generally, should therefore be targeted at accounting for a small number of exceptional cases. A more limited reform to account for these would be a review of the transfer system, rather than a more fundamental rewriting of the first instance jurisdiction of both courts.

13.54 The fourth proposal is considered in greater detail below through the comparative experience of England and Wales. This jurisdiction effectively has one national criminal court (the Crown Court). This system is described below, and some reasons for why it would be difficult to implement in Ireland are addressed.

13.55 This leaves the sixth proposal, which is to reform the current law of transfer between the jurisdiction of the Circuit Court and the Central Criminal Court. This was the option ultimately favoured by the 2003 Working Group.<sup>49</sup> However, little was done on foot of this option and the Commission is doubtful that whatever benefits it might bring are outweighed by the costs that it would almost certainly bear.

## 1. England and Wales

13.56 In England and Wales, the trial of all offences begins in the Magistrates' Court. Indictable offences (and some 'either-way' offences) are returned for full trial in the Crown Court. This places the Crown Court as something of an intermediate between the positions occupied by the Circuit Court and Central Criminal Court in Ireland. An important terminological difference must be noted here: the Central Criminal Court in England and Wales is the Crown Court, not the High Court, exercising its criminal jurisdiction in London (sitting in the Old Bailey).<sup>50</sup>

13.57 The Criminal Practice Directions 2015 posit a detailed hierarchy of offences for the purposes of listing. This is reproduced below in Table 13.1.

Class 1 Offences				Class 2 Offences			Class 3 Offences
A	B	C	D	A	B	C	
Murder	Genocide	Prison mutiny <sup>51</sup>	Causing death by	Arson with intentional reckless	Any sexual offence other	Serious, complex fraud	Any offence not listed in

<sup>49</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) at paragraph 563.

<sup>50</sup> Section 8(3) of the *Supreme Court Act 1981*.

<sup>51</sup> *Prison Security Act 1992*.



Class 1 Offences				Class 2 Offences			Class 3 Offences
A	B	C	D	A	B	C	
			dangerous driving	endangerment of life	than those in Class 1C		any of the other classes
Attempted murder	Torture; hostage taking <sup>52</sup>	Riot in the course of serious civil disturbance	Causing death by careless driving	Explosives/firearms cases	Kidnapping/false imprisonment (with intention to commit a sexual offence, or charged on same indictment)	Serious and/or complex money laundering	
Manslaughter	Offences under ss 51 & 52 of the International Criminal Courts Act	Serious gang related crime	Causing death by unlicensed, disqualified or uninsured driving	Kidnapping or false imprisonment <sup>53</sup>		Serious and/or complex bribery	
Infanticide	Offences under s 1 of the Geneva Conventions Act 1957	Complex sexual offence cases	Any health and safety case resulting in a fatality or permanent, serious disability	Cases where defendant is a police officer, legal professional, or public figure		Corruption	
Child destruction <sup>54</sup>	Terrorism offences	Cases involving people trafficking for sexual, labour, or other exploitation and cases of human servitude	Any other case resulting in a fatality or permanent, serious disability	Cases in which the complainant or an important witness is a public figure		Complex cases in which the defendant is a corporation	
Abortion <sup>55</sup>	Piracy <sup>56</sup>			Riot otherwise than in the course of serious civil disturbance		Any case in which the defendant is a corporation with a turnover in excess of £1bn	
Assisting a suicide	Treason			Child cruelty			
Section 5 domestic violence (if a	Offences under the Official Secrets Acts			Section 5 domestic violence (if no			

<sup>52</sup> And other offences under the *War Crimes Act 1991*.

<sup>53</sup> If charged on the same indictment as a serious offence of violence.

<sup>54</sup> Section 1(1) of the *Infant Life (Preservation) Act 1929*.

<sup>55</sup> Section 58 of the *Offences Against the Person Act 1861*.

<sup>56</sup> *Merchant Shipping and Maritime Security Act 1997*.

Class 1 Offences				Class 2 Offences			Class 3 Offences
A	B	C	D	A	B	C	
fatality has occurred) <sup>57</sup>				fatality has occurred) <sup>58</sup>			
	Incitement to disaffection						
Soliciting, inciting, encouraging or assisting, attempting, or conspiring to commit any of the above offences (inchoate or accessorial liability also fall into the same class as the principal or choate offence)							

**Table 13.1 Summary of England and Wales Trial Venue Allocation System**

13.58 Criminal Practice Direction XIII, Listing E determines the types of cases that may be heard by different courts and judges. In general, all Class 1 offences may only be heard by a High Court judge, a Circuit Judge or by a Deputy High Court Judge or Deputy Circuit Judge with specific authorisation. The exception is that Class 1D offences, as well as Class 2 offences, may be tried by a High Court judge or a Circuit Judge, Deputy High Court Judge, Deputy Circuit Judge, or Recorder, who has been specially authorised.

13.59 A Circuit Judge will ordinarily try cases in Classes 1D, 2A and 2C.<sup>59</sup> Cases in Class 3 may be tried by most kinds of judges and will ordinarily not be listed for trial by a High Court Judge.<sup>60</sup>

13.60 The system for determining initial trial venue in England is thus significantly more complex than that which operates in Ireland. Transfer between Crown Courts (including between the Central Criminal Court and other Crown Courts) is allowed under section 76(1) of the *Supreme Court Act 1981*.

13.61 The Working Group on the Jurisdiction of the Courts did not support the introduction of the English system to Ireland.<sup>61</sup> It correctly identified that to transpose the English system to Ireland would in effect create a national criminal court, as it would effectively merge the criminal jurisdiction of the High Court and that of the Circuit Court. The Group expressed some doubt that a merger of this complexity would work well in a country with a significantly smaller and less distributed population than that in England and Wales.<sup>62</sup> Citing the Auld report on the Criminal Courts, the Group also noted that the system of “ticketing” judges for serious cases had led to tension and conflict among members of the

<sup>57</sup> *Domestic Violence, Crime and Victims Act 2004*.

<sup>58</sup> *Ibid.*

<sup>59</sup> Practice Directions, E.7.

<sup>60</sup> Practice Directions, E.8.

<sup>61</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Courts Service 2003) at paragraphs 560 and 561.

<sup>62</sup> *Ibid.* at paragraph 554.

judiciary.<sup>63</sup> Similar difficulties would arise here, with a distinction being drawn between two types of judges sitting in a single court. This might lead to resentment where the caseload of the court is shared between judges, but unevenly because of the “ticketing” system.

13.62 The Working Group also noted that the High Court, a court that is already under some strain to meet its caseload in a quick and timely manner, would likely only be placed under further pressure by a reform such as this one.<sup>64</sup> Allocating the required number of High Court judges to a national criminal court would be difficult, and these judges would additionally have to sit in various locations across the country.

13.63 Most fundamentally, the Group was of the opinion that business is already dealt with quite efficiently in the Circuit Court, and that reforms should aim to preserve and ameliorate this efficiency.<sup>65</sup> A national criminal court would do more to frustrate this objective than further it. Furthermore, with respect to the topic of this chapter, it is not clear why, if the Circuit Court is accomplishing its criminal law tasks efficiently, there should be a provision to transfer cases away from this efficient system.

## 2. New Zealand

13.64 Some submissions received by the Commission drew particular attention to the model that operates in New Zealand. Under this model, offences are divided into four categories based on their maximum penalties:<sup>66</sup>

(1) Category 1 offences may be punished by fine only;

(2) Category 2 offences may be punished by a term of imprisonment of less than two years, or community work;

(3) Category 3 offences may be punished by a life sentence or by imprisonment for two years or more; and

(4) Category 4 offences are specifically designated in Schedule 1 of the *Criminal Procedure Act 2011* (these include murder, manslaughter, and other serious offences).

13.65 Category 1 and 2 offences are tried summarily in the District Court.<sup>67</sup> Category 2 offences may be tried in the High Court if that court issues an order to that effect.<sup>68</sup> In this case it is still tried summarily, but in the High Court and not the District Court. Category 3 offences

<sup>63</sup> *Ibid.* at paragraph 555, citing Auld, *Review of the Criminal Courts of England and Wales* (2001).

<sup>64</sup> *Ibid.* at paragraph 556.

<sup>65</sup> *Ibid.* at paragraph 559.

<sup>66</sup> *Criminal Procedure Act 2011*.

<sup>67</sup> Sections 71 and 72 *Criminal Procedure Act 2011*. The District Court is the court immediately below the High Court in the New Zealand court structure. It is therefore loosely analogous to the Irish Circuit Court.

<sup>68</sup> Sections 68 and 70 of the *Criminal Procedure Act 2011*.

are analogous to “either-way” offences in Ireland: they may be tried summarily or with a jury in the District Court (the defendant may elect for trial by jury; otherwise, the offence is tried summarily).<sup>69</sup> These cases may also be tried in the High Court if that court so orders. Category 4 offences are always subject to a jury trial in the High Court.<sup>70</sup>

13.66 There is also an additional subcategory of offences known as ‘protocol offences’.<sup>71</sup> These are Category 2 or 3 offences which have been designated by the Chief High Court Judge and Chief District Court Judge under section 66 of the 2011 Act. These offences go to the High Court initially for determination as to whether the District or High Court is the more appropriate location for trial.<sup>72</sup>

13.67 The process for transfers between the District Court (the lower court for trial by indictment) and the High Court is outlined in section 67 of the Criminal Procedure Act 2011. This provides the judge with a list of qualitative criteria to which they must have regard in considering transferring a trial:

- (1) The nature and seriousness of the offence charged;
- (2) The complexity of the factual and legal issues likely to arise in the proceeding;
- (3) The likelihood that the proceeding will be of wide public concern;
- (4) Any need for enhanced security or facilities during the trial that are not readily available in the District Court;
- (5) The desirability of the prompt disposal of trials and the respective workloads of the High Court and the District Court in the locality of the trial; and
- (6) The likelihood of a sentence beyond the jurisdiction of the District Court; and
- (7) The interests of justice generally.

13.68 What is notable about this list is the precedence it gives to qualitative criteria. The seriousness of the offence/penalty and the likelihood of wide public concern are two notable criteria.

13.69 The Commission is not of the view that a system along the lines of the New Zealand system would be appropriate or effective in Ireland. In order to mirror this system, there

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<sup>69</sup> Section 73 of the *Criminal Procedure Act 2011*.

<sup>70</sup> Section 74 of the *Criminal Procedure Act 2011*.

<sup>71</sup> Section 66 of the *Criminal Procedure Act 2011*.

<sup>72</sup> Sections 67 and 68 of the *Criminal Procedure Act 2011*.

would have to be a root-and-branch reappraisal of the categorisation of criminal offences in this jurisdiction. This task goes beyond the remit of the current Report. Further research would have to be done in order to determine whether such a restructuring would work and how existing crimes would be recategorised. As such, the Commission cannot endorse this system.

## F. Conclusions and Recommendations

13.70 The Commission has previously considered and made recommendations regarding the extension of the jurisdiction of the Central Criminal Court, and the contraction of the jurisdiction of the Circuit Court.

13.71 In the 1988 *Report on Rape and Sexual Offences*,<sup>73</sup> the Commission noted the following arguments of relevance to this Report:

(1) All trials involving serious crimes (bar the limited exceptions of murder, etc.) are exclusively tried by the Circuit Court.

(2) Therefore, the Circuit Court has capacity to try serious cases.

(3) Therefore, the jurisdiction of the Circuit Court cannot be reduced solely on the basis of the seriousness of a particular crime.

13.72 In response to this argument, the Commission maintained that it was not of the view, at least in reference to rape trials, that the imbalance between the Central and Circuit Criminal Courts was justified. The Commission also considered that the High Court should have a “realistic and comprehensive” criminal jurisdiction. In 1990, the Oireachtas, in enacting the *Criminal Law (Rape) (Amendment) Act 1990*, accepted the Commission’s view that all rape prosecutions should be tried in the Central Criminal Court.

13.73 The Commission considers that the approach taken in the 1988 Report can be distinguished from the issue being considered in this Report. Rape is an offence in respect of which it can be stated, as a matter of principle, that all prosecutions merit similar treatment. By contrast, the same cannot be said for all fraud offences, which are recognised as offences carrying widely differing levels of moral blameworthiness related to the particular circumstances that arise. This justifies taking a different approach in principle. Thus, at most, the different degrees of fraud indicate that only some fraud offences could be thought to be appropriate candidates for trial in the Central Criminal Court.

13.74 As mentioned at the beginning of this chapter, the court to which a case should be returned for trial at first instance is not a topic on which the Commission wishes to deliberate here. The only question is whether a transfer system between the Circuit

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<sup>73</sup> Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24-1988) at paragraph 46.

Criminal Court and the Central Criminal Court is justified in connection with the type of corporate offences under consideration in this Report.

13.75 It is appropriate to note in this context that, as discussed in the previous chapters of this Report, all the prosecutions on indictment that concerned banking-related matters have been tried in the Circuit Criminal Court between 2014 and 2018. In *The People (DPP) v McAteer and Whelan* (2014)<sup>74</sup> the 2 defendants were convicted of offences under the *Companies Acts*. In *The People (DPP) v Bowe, Casey and McAteer* (2016)<sup>75</sup> and *The People (DPP) v Drumm* (2018)<sup>76</sup> the defendants were convicted of the common law offence of conspiracy to defraud and also for false accounting under the *Criminal law (Theft and Fraud Offences) Act 2001* and received significant custodial sentences. In *The People (DPP) v Fitzpatrick* (2017),<sup>77</sup> the trial judge directed the jury to acquit the defendant, and the detailed reasons given for this greatly influenced the Government's proposals for further reform of the law on corporate crime.<sup>78</sup> In each of these trials, it is clear that the trial judges in the Circuit Criminal Court more than capably addressed and dealt with the many complex procedural and substantive legal issues that arose in them.

13.76 For all the reasons given above, the Commission is therefore satisfied that there is no clear case for transferring from the Circuit Criminal Court the type of corporate offences under consideration in this Report, and does not therefore recommend that any of the transfer systems discussed above should be introduced. Examination of more extensive reform options, such as the reclassification of offences under a more detailed framework such as exists in New Zealand, falls outside the scope of this Report.

**R 13.01 The Commission recommends that the current statutory arrangements for assigning trials on indictment as between the Circuit Criminal Court and the Central Criminal Court (High Court) should be retained.**

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<sup>74</sup> Circuit Criminal Court (Judge Nolan and a jury), 9 April 2014, *The Irish Times*, 10 April 2014 (conviction by jury), 28 April 2014, *The Irish Times*, 29 April 2014 (sentencing). The defendants were sentenced to community service.

<sup>75</sup> Circuit Criminal Court (Judge Nolan and a jury), 1 June 2016, *The Irish Times*, 2 June 2016 (conviction by jury), 14 September 2016, *The Irish Times*, 15 September 2016 (sentencing). The first defendant (Bowe) was sentenced to 2 years imprisonment, the second defendant (Casey) was sentenced to 2 years and 9 months imprisonment, and the third defendant (McAteer) was sentenced to 3½ years imprisonment. On appeal by the first and second defendants, the Court of Appeal dismissed the appeal: *The People (DPP) v Bowe and Casey* [2017] IECA 250.

<sup>76</sup> Circuit Criminal Court (Judge O'Connor and a jury), 6 June 2018, *The Irish Times*, 7 June 2018 (conviction by jury), 20 June 2018, *The Irish Times*, 21 June 2018 (sentencing). The defendant was sentenced to 6 years imprisonment.

<sup>77</sup> Circuit Criminal Court (Judge Aylmer and a jury), 23 May 2017, *The Irish Times*, 24 May 2017 (trial judge ruling that jury will be directed to find defendant not guilty), 24 May 2017, *The Irish Times*, 25 May 2017 (verdict of not guilty; and prosecution announcing that other charges dropped).

<sup>78</sup> See chapter 1, paras 1.66ff, above, discussing the proposals for reform in the November 2017 document *Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework*.

# SUMMARY OF RECOMMENDATIONS

## Chapter 1 Overview and Need for a Corporate Crime Agency

**R 1.01** The Commission commends the proposal in the November 2017 document *Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework*<sup>1</sup> to “establish a new independent Agency to greater enhance the State’s ability to undertake modern, complex corporate law enforcement.” The Commission recommends that the proposed Corporate Crime Agency should be established, without undue delay, on a statutory basis and should comprise multi-disciplinary personnel similar to, though not identical to, the multi-disciplinary model used when the Criminal Assets Bureau was established under the Criminal Assets Bureau Act 1996.

**R 1.02** The Commission recommends that the proposed Agency should have its own statutory mandate to investigate corporate criminal offences independently of any referrals it may receive from financial or economic regulators, with whom there should be suitable co-ordination and cooperation agreements (see Chapter 6 of the Report). The Commission also recommends that, in light of experience, the proposed Agency must be sufficiently resourced to carry out its functions.<sup>2</sup>

**R 1.03** The Commission also recommends that a dedicated prosecution unit for corporate offences should be established, ideally within the Office of the Director of Public Prosecutions, to work in close liaison with the proposed Agency, to ensure that the most efficient processes are in place to prepare a prosecution on indictment for corporate offences in accordance with the relevant principles and rules applicable to a trial on indictment. The Commission also recommends that, in light of experience, the proposed unit must be sufficiently resourced to carry out its functions.<sup>3</sup>

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<sup>1</sup> *Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework: Ireland combatting “white collar crime”* (November 2017), at 8.

<sup>2</sup> The precise level of resourcing required for the proposed Agency is outside the expertise of the Commission.

<sup>3</sup> The precise level of resourcing required for the proposed unit is outside the expertise of the Commission.

## Chapter 2 A Standard Template for Regulatory Powers

**R 2.01** The Commission recommends that a common legislative template of powers – a “core regulatory toolkit” – be developed for all similarly situated financial and economic regulators.

**R 2.02** The Commission recommends that the common legislative template of powers should include at least the following list of core powers:

- (1) Power to issue a range of warning directions or notices, including to obtain information by written request and “cease and desist” notices;
- (2) Power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;
- (3) Power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents (including provision for determining issues of privilege);
- (4) Power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);
- (5) Power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes;
- (6) Power to bring summary criminal prosecutions (prosecutions on indictment are referred to the Director of Public Prosecutions).

**R 2.03** The Commission recommends that the common legislative template of powers should be used to facilitate the use of a common formula of words when conferring financial and economic regulators with particular powers, and to avoid any gaps identified through case law such as in *CRH plc, Irish Cement Ltd v Competition and Consumer Protection Commission*.

**R 2.04** The Commission recommends that the common legislative template of powers in Recommendation 2.01, above, could form the basis for a single *Regulatory Powers Act* (as has been enacted in some jurisdictions) but the Commission does not consider that such an Act is appropriate at this time.

**R 2.05** The Commission recommends that a Regulatory Guidance Office, with membership drawn from Government Departments and Regulators, should be established with a remit to provide guidance and information on regulatory matters, including: national and international best practice in economic regulation, the content of Regulatory Impact Assessments (or comparable documents) and lessons learned from relevant case law.



## Chapter 3 Administrative Financial Sanctions

- R 3.01** The Commission recommends that, subject to the principles and procedural safeguards recommended below, the power to impose administrative financial sanctions is both valuable and necessary in ensuring that financial and economic regulators have the requisite powers to achieve their regulatory objectives.
- R 3.02** The Commission recommends that the financial and economic regulators encompassed by this Report be provided with the power to impose administrative financial sanctions.
- R 3.03** The Commission recommends that, subject to the specific recommendations below, the statutory regime under which the Central Bank imposes administrative financial sanctions provides a suitable model for the financial and economic regulators encompassed by this Report.
- R 3.04** The Commission recommends that the maximum statutory limits of administrative financial sanctions that may be imposed by the Central Bank under Part IIIC of the *Central Bank Act 1942*, as amended, are appropriate, which are, in most cases:
- (1) for corporate bodies: €10 million or 10% of annual turnover, or;
  - (2) for natural persons: €1 million.
- R 3.05** The Commission recommends that the Central Bank, and comparable financial and economic regulators, be empowered to remove any economic benefit derived from a regulatory breach.
- R 3.06** The Commission recommends that the Central Bank, and comparable financial regulators, be provided with the power to impose an administrative financial sanction up to a maximum of twice the amount of economic benefit gained from the breach.
- R 3.07** The Commission recommends that the Central Bank, and comparable financial regulators, should be empowered to put in place a legal costs assistance scheme, the details of which should be set out in regulations.
- R 3.08** The Commission recommends that there should be a statutory requirement for information exchange barriers to be erected between those involved in supervisory and enforcement activities in the Central Bank, and comparable financial regulators.
- R 3.09** The Commission recommends that the hearing by which an administrative financial sanction may potentially be imposed, referred to as the “Adjudicative Panel Process”, should be based on an adversarial model, comparable to the approach used in disciplinary bodies for the legal and medical professions. This approach involves an internal investigatory unit presenting its case on an adversarial basis to an externally sourced adjudicative panel, and in which the party being investigated is also represented.
- R 3.10** The Commission recommends that the externally-sourced adjudicative panel should, as is the case with disciplinary bodies for the legal and medical professions, be an internal entity within the regulators.

- R 3.11** The Commission recommends that each financial or economic regulator encompassed by this Report be empowered to establish a committee to be referred to as the “Adjudicative Panel Committee” with the following elements:
- (1)** the membership of the Adjudicative Panel Committee should be persons external to the regulator;
  - (2)** the membership of the Adjudicative Panel Committee should be in a ratio of 2:1 between “suitably qualified” individuals and legally qualified persons, each of more than 10 years standing; and,
  - (3)** the membership of the Adjudicative Panel Committee should contain a sufficient number of persons to avoid conflicts of interest in the make-up of a specific 3 person Committee.
- R 3.12** The Commission recommends that before holding a hearing of the Adjudicative Panel Committee, the Regulator must give notice in writing of the proposed hearing to the regulated entity. The notice should specify the grounds on which the Regulator’s suspicions of a regulatory breach are based, specify a date, time and place at which the Regulator will hold the hearing, and invite the regulated entity to attend or to make written submissions about the matter to which the hearing relates.
- R 3.13** The Commission recommends that the Adjudicative Panel Committee hearing should be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.
- R 3.14** The Commission recommends that at the Adjudicative Panel Committee hearing, the rules of procedural fairness should be followed, but it should not be bound by all the rules of evidence.
- R 3.15** The Commission recommends that the standard of proof at the Adjudicative Panel Committee should be the balance of probabilities.
- R 3.16** The Commission recommends that the person presiding at the Adjudicative Panel Committee hearing should have the power to require a witness at the hearing to answer a question put to the witness, and to require a person appearing at the hearing to produce specified documents.
- R 3.17** The Commission recommends that the person presiding at an Adjudicative Panel Committee hearing should have the power to allow a witness at the hearing to give evidence by tendering a written statement, which, if the person presiding so requires, must be verified by oath or affirmation.
- R 3.18** The Commission recommends that the Adjudicative Panel Committee have the same powers of a judge of the High Court when hearing civil proceedings as to the examination of witnesses, including witnesses who are outside the State.

- R 3.19** The Commission recommends that a person who is summoned to appear before an Adjudicative Panel Committee hearing should be entitled to the same rights and privileges as a witness appearing in civil proceedings before the High Court.
- R 3.20** The Commission recommends that a person who obstructs an Adjudicative Panel Committee in the exercise of its hearing powers without reasonable excuse, or who fails to comply with a requirement or request made by the Adjudicative Panel Committee, or who in purported compliance with such a requirement or request, gives information that the person knows to be false or misleading, or who refuses to comply with a summons to attend before, or to be examined on oath or affirmation by, the Adjudicative Panel Committee, commits an offence.
- R 3.21** The Commission recommends that following the hearing, the Adjudicative Panel Committee must make a report to the High Court, which must address, insofar as they are applicable and appropriate, the following matters:
- (1) the alleged regulatory breaches which required the hearing before the Adjudicative Panel Committee and the Adjudicative Panel Committee's findings in relation to each of those findings;
  - (2) a note on the evidence given to the Adjudicative Panel Committee;
  - (3) the Adjudicative Panel Committee's recommendation as to the appropriate sanction;
  - (4) any other matters which the Adjudicative Panel Committee may think fit to report.
- R 3.22** The Commission also recommends that both parties may submit written submissions and affidavits to the High Court.
- R 3.23** The Commission recommends that the role of the High Court, based on the report, submissions and affidavits presented to it, is either to give judicial approval to the Adjudicative Panel Committee's decision or to refuse such approval. The Commission therefore recommends that the High Court may either (a) approve the Adjudicative Panel Committee's decision, in which case the matter has come to an end, subject to appeal, or (b) not approve the Adjudicative Panel Committee's decision, in which case the High Court remits the matter to the Adjudicative Panel Committee, and this may include remittal subject to directions on, for example, substantive points or procedural points.
- R 3.24** The Commission recommends that provision be made for the appeal of decisions of the High Court to the Court of Appeal, provided the Court of Appeal is satisfied that:
- (1) the decision involves a matter of general public importance; or,
  - (2) in the interest of justice, it is necessary that there be an appeal to the Court of Appeal

**R 3.25** The Commission recommends that the Regulator, the Adjudicative Panel Committee and the regulated entity may be assisted by a legal practitioner at the hearing, the details of which should be set out in regulations.

**R 3.26** The Commission recommends that there should be an express power to award costs in connection with investigations and hearings by the Adjudicative Panel Committee, the details of which may be set out in regulations.

**R 3.27** The Commission recommends that, in the interests of transparency and accountability, where an administrative financial sanction is imposed, the Regulator must publish details on the sanction in such form and manner as is appropriate, including on the Regulator's website.

**R 3.28** The Commission recommends that the following terms should be included in the public statement outlining the sanction imposed:

- (1) the name of the regulated entity or individual on whom a sanction has been imposed;
- (2) the nature of the breach in respect of which the sanction has been imposed and the specific provision which the regulated entity or individual has contravened;
- (3) details of the sanction imposed, including the sanction amount and the criteria relevant to the figure arrived at; and,
- (4) the grounds on which the finding of a contravention is based.

**R 3.29** The Commission recommends that, where it is necessary to exclude any information in the public statement, this should be done to the minimum extent possible to prevent any unfair prejudice from arising.

**R 3.30** The Commission recommends that where any of the elements of the administrative financial sanction have initially been omitted from the public statement, and where subsequent publication would no longer unfairly prejudice the regulated entity, individual or other third party, a supplementary public statement shall be published, including the previously omitted elements.

**R 3.31** The Commission recommends that in determining the appropriate level of administrative financial sanction, the Adjudicative Panel Committee should be required to take into account all relevant circumstances, including, where appropriate:

- (1) the gravity and the duration of the breach;
- (2) the degree of responsibility of the natural or legal person responsible for the breach;
- (3) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;

- (4) the importance of profits gained, or losses avoided, by the natural or legal person responsible for the breach, insofar as they can be determined;**
- (5) the losses for third parties caused by the breach, insofar as they can be determined;**
- (6) the level of cooperation of the natural or legal person responsible for the breach with the competent authority;**
- (7) previous breaches by the natural or legal person responsible for the breach;  
and**
- (8) any action taken to mitigate the damage caused by the breach.**

**R 3.32 The Commission recommends that the financial and economic regulators encompassed by this Report be provided with the express power to remove economic benefit derived from a regulatory breach.**

**R 3.33 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an upper limit of €10 million or 10% of annual turnover, whichever figure is the greater.**

**R 3.34 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a natural person, an upper limit of €1 million or 10% of annual income, whichever figure is the greater.**

**R 3.35 The Commission recommends that the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an overriding requirement that the level of the sanction should not be so high that it would be likely to cause the regulated entity to cease business.**

**R 3.36 The Commission recommends that the standardised regulatory powers template should involve, in the case of an Administrative Financial Sanction as applied to a natural person, an overriding requirement that the level of the sanction should not be so high that it would be likely to cause the person to be adjudicated bankrupt.**

**R 3.37 The Commission recommends that each regulator should be required to publish guidance on enforcement policy and its use of administrative financial sanctions.**

## Chapter 4 Regulatory Enforcement Agreements

- R 4.01** The Commission recommends that, subject to the below recommendations and the recommendations in the previous chapter, the powers and procedures by which the Central Bank reaches settlement agreement with regulated entities and individuals are fit for purpose and do not require reform.
- R 4.02** The Commission recommends that regulators within the scope of this Report should be provided with the power, subject to the principles set out below, to enter into regulatory enforcement agreements (REAs) to settle administrative financial sanctions (AFS) proceedings with a regulated entity or an individual.
- R 4.03** The Commission recommends that a regulator should only enter into regulatory enforcement agreements with the regulated entity or individual in respect of an enforcement action where the regulator is of the opinion that it is appropriate to do so, having regard to the regulator's enforcement objectives, the circumstances of the breach and the interests of justice, and any other relevant matters.
- R 4.04** The Commission recommends that, the regulator, or its internal enforcement department as the case may be, shall be responsible for entering into negotiations for a Regulatory Enforcement Agreement with the regulated entity or individual, in order to settle administrative financial sanctions proceedings against the regulated entity or individual.
- R 4.05** The Commission recommends that, once a regulatory enforcement agreement has been entered into between the regulator and regulated entity or individual, no other enforcement process should be available to the regulator in respect of the facts that gave rise to the Regulatory enforcement agreement, where those facts are set out in good faith by the regulated entity or individual in their disclosures to the regulator.
- R 4.06** The Commission recommends that, once enforcement action, such as an administrative financial sanctions proceeding, has been concluded by the regulator in respect of a prescribed contravention, it shall not be possible for the regulator to enter into a regulatory enforcement agreement with the regulated entity or individual in respect of the facts that gave rise to the other enforcement action.
- R 4.07** The Commission recommends that, subject to the following recommendations regarding the level of discount, in calculating the level of the financial sanction to be agreed as a result of a regulatory enforcement agreement, a regulator should be required to take into account all relevant circumstances including, where appropriate, any and all of the factors that the Adjudicative panel committee would have taken into account when deciding the appropriate level of administrative financial sanction.
- R 4.08** The Commission recommends that, if the Regulatory enforcement agreement is agreed with the regulator within the first time period prescribed by the regulator, the regulator may impose a maximum discount of 30% of the financial sum that would have been imposed as an administrative financial sanction.

- R 4.09** The Commission recommends that if the Regulatory enforcement agreement is agreed with the regulator after the expiry of the time period prescribed by the regulator, but before the end of the second time period prescribed by the regulator the regulator may impose a maximum discount of 10% of the financial sum that would have been imposed as an administrative financial sanction.
- R 4.10** The Commission recommends that, in the calculation of the financial sanction element of a regulatory enforcement agreement, any discount should not apply to the portion of the sanction that relates to the removal of the economic benefit derived from a regulatory breach.
- R 4.11** The Commission recommends that the terms of a regulatory enforcement agreement, agreed between the regulator and the regulated entity, must be evidenced in writing.
- R 4.12** The Commission recommends that it should be a precondition of entering into a regulatory enforcement agreement that the regulated entity or individual accept responsibility for the contravention.
- R 4.13** The Commission recommends that, without prejudice to Recommendation 4.29, below, it should not be a requirement of a regulatory enforcement agreement, bearing in mind that it is a voluntary agreement, that it be confirmed by the High Court for it to come into operation.
- R 4.14** The Commission recommends that negotiations between the regulator and the regulated entity or individual concerning the terms of a regulatory enforcement agreement should be undertaken on a “without prejudice” basis, in respect of the disclosures made by the regulated entity as well as the regulator’s capacity to use other enforcement tools.
- R 4.15** The Commission recommends that, as a precondition for the initiation of negotiations between the regulator and the regulated entity or individual, all parties to the negotiations shall agree that neither the contents of the negotiations, nor the fact that negotiations are taking place, are to be disclosed while the parties are conducting the negotiations.
- R 4.16** The Commission recommends that negotiations between the regulator and the regulated entity or individual, concerning the implementation of a regulatory enforcement agreement shall be conducted otherwise than in public.
- R 4.17** The Commission recommends that, in the interests of transparency and accountability, where the regulator enters into a regulatory enforcement agreement with a regulated entity, this agreement shall be accompanied by a detailed public statement, outlining the terms and objectives of the regulatory enforcement agreement.
- R 4.18** The Commission recommends that the following terms must be included in the public statement outlining the terms of the regulatory enforcement agreement, unless publication of one or more of the terms from the public statement would unfairly prejudice the interests of the regulated entity or individual concerned or those of a third party:

- (1) The name of the regulated entity or individual reaching the settlement with the regulator;**
- (2) The nature of the breach and the specific provision that the regulated entity or individual has contravened;**
- (3) That the regulated entity or individual accepts responsibility for the breach;**
- (4) The level of the monetary sanction agreed, including the criteria relevant to the figure arrived at;**
- (5) The level of discount applied, if any, and the reasons for the level of discount; and,**
- (6) The amount of any compensation payments and the nature of remedial action, such as a redress scheme, agreed as part of the settlement, if any.**

**R 4.19 The Commission recommends that, where it is necessary for the regulator to exclude any of the information set out in Recommendation 4.18, this should be done to the minimum extent possible to prevent any unfair prejudice from arising.**

**R 4.20 The Commission recommends that, where one or more of the terms of the regulatory enforcement agreement has or have been omitted from the public statement as originally published, but where subsequent publication would no longer unfairly prejudice the regulated entity, individual or other third party, the regulator shall publish a supplementary public statement including the previously omitted term or terms, provided, in all cases that the passage of time would not make this obligation unduly burdensome on the regulator.**

**R 4.21 The Commission recommends that, as part of a regulatory enforcement agreement, a regulator should have the express power to agree financial compensation payments to be paid by the regulated entity responsible for the breach, to any victims of the breach, including by means of a redress scheme.**

**R 4.22 The Commission recommends that, in the calculation of the sanction as a result of settlement, any discount should not apply to the compensation element of the sanction.**

**R 4.23 The Commission recommends that, where financial compensation of victims of contraventions is included in a regulatory enforcement agreement, in calculating the level of this compensation, no regard is to be had to the upper monetary limit or percentage of annual turnover or income that may be imposed on the regulated entity or individual.**

**R 4.24 The Commission recommends that where financial compensation of victims is included as part of a regulatory enforcement agreement, the regulator, in calculating the overall amount of this compensation to victims (to the extent that this is possible at the time when the regulatory enforcement agreement is entered into), shall endeavour to ensure that that the overall amount, combined with any other financial sanction that is agreed,**



is not so high as would be likely to cause the regulated entity to cease business or the individual to be adjudicated bankrupt.

- R 4.25** The Commission recommends that regulatory enforcement agreements should be capable of variation, subject to the criteria set out in subsequent recommendations, where the regulator considers that it is appropriate to vary the terms of the original agreement, having regard to its enforcement objectives and the general principles applicable to regulatory enforcement agreements.
- R 4.26** The Commission recommends that the terms of a regulatory enforcement agreement may be varied where circumstances outside the control of either party to it have subsequently arisen to the extent that it would not be in the interests of justice to continue to enforce the terms of the original regulatory enforcement agreement and where the regulator and the regulated entity or individual concerned each consent to the variation.
- R 4.27** The Commission recommends that where a regulated entity or individual fails to comply with any of the terms of the regulatory enforcement agreement, the regulator may apply to the High Court for an order requiring the regulated entity or individual to comply with that term.
- R 4.28** The Commission recommends that where the High Court is satisfied that the regulated entity or individual has failed to comply with any of the terms of the regulatory enforcement agreement, the High Court may make an order requiring the regulated entity or individual to comply with that term.
- R 4.29** The Commission recommends that a regulator may, by proceedings brought in a court of competent jurisdiction, recover as a debt due to the regulator any amount agreed to be paid under a Regulatory Enforcement Agreement.
- R 4.30** Without prejudice to Recommendation 4.13, above, the Commission recommends that the High Court may, upon the application of a regulator, make an order in the terms of a regulatory enforcement agreement (REA order) if the Court is satisfied that:
- (1) the regulated entity or individual consents to the making of the order;
  - (2) the regulated entity or individual obtained legal advice before so consenting;
  - (3) the agreement is clear and unambiguous and capable of being complied with,
  - (4) the regulated entity or individual is aware that failure to comply with any order so made would constitute contempt of court;
  - (5) the regulator has, not later than 14 days before the making of the application, complied with the requirements, set out in the above recommendations, that the details of the regulatory enforcement agreement are to be publicised; and
  - (6) the terms of the regulatory enforcement agreement are proportionate to the contravention involved and are in the interests of justice.

**R 4.31** The Commission recommends that the High Court should have the jurisdiction, on the application of any affected third party (that is, other than the regulator or the regulated entity or individual to which a regulatory enforcement agreement order applies), to vary or annul a regulatory enforcement agreement order if the Court is satisfied that the Regulatory enforcement agreement in respect of which the Regulatory enforcement agreement order was made requires the regulated entity or individual to which the Regulatory enforcement agreement order applies, to do, or refrain from doing, anything that would result in a breach of any contract between, on the one hand, the regulated entity or individual concerned and, on the other hand, the affected third party applicant, or that would otherwise render a term of that contract not capable of being performed.

**R 4.32** The Commission recommends that the High Court shall not make an order under the previous recommendation if it is satisfied that the contract or term of the contract to which the application for such order relates, is in breach of the law or is otherwise a contravention of regulations.

**R 4.33** The Commission recommends that the High Court should have jurisdiction, on the application of the regulator or a regulated entity or individual to which a regulatory enforcement agreement order applies, to vary or annul the Regulatory enforcement agreement order if:

- (1) the party (other than the applicant for the order) to the Regulatory enforcement agreement to which the Regulatory enforcement agreement order applies consents to the application,
- (2) the Regulatory enforcement agreement order contains a material error,
- (3) there has been a material change in circumstances since the making of the Regulatory enforcement agreement order that warrants the Court varying or annulling the order; or,
- (4) the Court is satisfied that, in the interests of justice, the Regulatory enforcement agreement order should be varied or annulled.

**R 4.34** The Commission recommends that a regulatory enforcement agreement order of the High Court shall cease to have effect 7 years after the making of the latest order of the Court in relation to the Regulatory enforcement agreement order.

**R 4.35** The Commission recommends that, notwithstanding Recommendation 4.32, the High Court may, on the application of the relevant regulator not earlier than 3 months before the expiration of a regulatory enforcement agreement order, make an order extending the period of the Regulatory enforcement agreement order (whether or not previously extended) for a further period not exceeding 3 years.

## Chapter 5 Deferred Prosecution Agreements

**R 5.01** The Commission recommends the introduction of Deferred Prosecution Agreements (DPAs) in Ireland which, to ensure that it is consistent with constitutional requirements, must be (a) on a statutory basis, (b) subject to judicial oversight, (c) subject to guiding principles and (d) contain sufficient procedural safeguards.

**R 5.02** The Commission recommends that the statutory scheme of DPAs should be operated under the control of the Director of Public Prosecutions (DPP), that the DPP would bring the terms of a DPA to the High Court and that a DPA would come into effect only when approved by the Court.

**R 5.03** The Commission recommends that the High Court should carry out a review of each term of the DPA, and the DPA in its entirety, and that before the DPA can be approved, the Court must determine that the terms individually, or when taken as a whole, satisfy the following two part test at both a preliminary and final hearing:

- (1) that the DPA as a whole and its individual terms are fair, reasonable and proportionate; and
- (2) that approval of the DPA is in the interests of justice.

**R 5.04** The Commission recommends that DPAs should only be applicable to corporate bodies (and other unincorporated undertakings such as partnerships) but not to natural persons.

**R 5.05** The Commission recommends that the DPA scheme should only be available in cases concerning specified offences, in which the offending is of sufficient seriousness to warrant a prosecution on indictment. The offences, which should be reviewed from time to time by the Oireachtas, could include:

- (1) The common law offence of conspiracy to defraud;
- (2) The common law offences of bribery and conspiracy to make corrupt payments;
- (3) Offences under the *Criminal Justices (Theft and Fraud Offences) Act 2001*;
- (4) Offences under the *Competition Act 2002*;
- (5) Offences under the *Companies Act 2014*;
- (6) Offences under the *Criminal Justice Act 2011*;
- (7) Offences under the *Taxes Consolidations Act 1997*, the *Stamp Duties Consolidation Act 1999*, the *Capital Acquisitions Tax Consolidation Act 2003*, and the *Value-Added Tax Act 1972*;
- (8) Offences under the *European Union (Market Abuse) Regulations 2016* (SI No 349 of 2016); and
- (9) Offences under the *Criminal Justice (Corruption Offences) Act 2018*.

- R 5.06** The Commission recommends that the statutory framework for DPAs will provide that the Director of Public Prosecutions (DPP) is to produce and publish a Code of Practice (comparable to the DPP's Guidance for the Cartel Immunity Programme), which will set out the detailed substantive and procedural elements of the DPA scheme, including the role of the DPP, the standards the DPP will apply in the process of negotiating and preliminarily agreeing a DPA and the relationship between the DPP and any relevant regulator in this context.
- R 5.07** The Commission recommends that the decision to invite a corporate body to negotiate a DPA will be a matter for the DPP's discretion based on a case made to the DPP by any relevant regulator.
- R 5.08** The Commission recommends that the DPA negotiations that take place between the DPP and the corporate body shall take place otherwise than in public, and the fact of the negotiations shall remain confidential during the negotiations.
- R 5.09** The Commission recommends that the DPP shall, where the DPP has determined that a DPA is likely to be the appropriate outcome for a specific case, make an initial application to the High Court for preliminary approval of the DPA, and that the matter may not proceed further unless the Court considers that the application meets the criteria set out in Recommendation 5.03.
- R 5.10** The Commission recommends that, notwithstanding the High Court's indicative approval in the preliminary hearing, the DPA can only come into effect where the Court approves of a DPA in a final approval hearing.
- R 5.11** The Commission recommends that the statutory framework for DPAs should expressly provide that nothing in the legislation, or in any guidance or Code of Practice, shall alter or affect the corporate body's rights in relation to asserting legal professional privilege.
- R 5.12** The Commission recommends that the preliminary approval hearing shall be held otherwise than in public.
- R 5.13** The Commission recommends that the final approval hearing shall be held in public.
- R 5.14** The Commission recommends that DPAs approved by the High Court shall be published in full on the DPP's website.
- R 5.15** The Commission recommends that, without prejudice to any other terms that the Court shall approve, the following mandatory terms shall be included in each approved DPA:
- (1)** A statement of facts outlining the full extent, nature, and circumstances of the corporate body's offending.
  - (2)** A time period after which the agreement will expire.
  - (3)** A financial penalty.

- R 5.16** The Commission recommends that the terms of the DPA may be varied by order by the High Court, or as agreed between the parties and with the approval of the High Court.
- R 5.17** The Commission recommends that the High Court shall have jurisdiction to consider, on the application of the DPP, a suspected breach of the terms of the DPA, and this should provide for different treatment of the breach depending on whether the breach is (a) a minor breach, that is, a breach that does not amount to a serious or material breach; and (b) a serious or material breach.
- R 5.18** The Commission recommends that, where the High Court determines that there has been a serious or material breach of the DPA, the Court shall order the termination of the DPA.
- R 5.19** The Commission recommends that in the case of all breaches of the DPA as determined by the High Court, the DPP shall publish details of each breach.
- R 5.20** The Commission recommends that upon the expiry of the DPA's period of deferral, if there is no ongoing breach application in process, the DPP shall give notice to the High Court that the DPA has concluded.
- R 5.21** The Commission recommends that in any criminal proceedings brought against the corporate body which are either:
- (1) A resumption of the previously suspended indictment, following the termination of a DPA for a serious or material breach; or
  - (2) Further criminal proceedings freshly instituted against the corporate body,
- the statement of facts included in the DPA may be relied upon by the prosecutor in evidence, as an admission by the corporate body of its contents, as they relate to that body.
- R 5.22** The Commission recommends that in civil proceedings brought against the corporate body, by any party, the statement of facts appearing in an approved DPA may be relied upon by that party as an express admission by the corporate body of the content of the statement.

## **Chapter 6 Coordination between Regulators**

- R 6.01** The Commission recommends that, where the jurisdiction of different regulators overlaps, the regulators concerned should implement a Framework Agreement or Memorandum of Understanding, which may, but need not necessarily, be in statutory form, to facilitate the coordination of standard setting, monitoring, and enforcement activities between regulators.
- R 6.02** The Commission recommends that, where regulators operate within the same sector, appropriate mechanisms, taking account of relevant statutory requirements including as to data protection, should be implemented to ensure the sharing of information and expertise between regulators.
- R 6.03** The Commission recommends that regulators, when entering into cooperation agreements, should agree clear objectives for these agreements.
- R 6.04** The Commission recommends that the remit of the Regulatory Guidance Office recommended in Chapter 2, above, could include policy on coordination between regulators.
- R 6.05** The Commission recommends that the Regulatory Guidance Office could provide general guidelines for regulators as to the detailed contents of cooperation agreements.
- R 6.06** The Commission recommends that regulators should, where appropriate, both as part of cooperation agreements and in general, employ consultation as a coordinating instrument to facilitate the flow of expertise, knowledge and experience between regulators.
- R 6.07** The Commission recommends that, in the interest of transparency and accountability, regulators should publish guidelines governing the consultation process with other regulators.
- R 6.08** The Commission recommends that in the interest of transparency and accountability, where possible and appropriate, regulators should publish the information that they provide to other regulators during a consultation process.
- R 6.09** The Commission recommends that regulators should, where appropriate, implement a lead agency approach to the coordination of regulatory activities.
- R 6.10** The Commission recommends that, preferably, the lead agency should be determined in accordance with an agreement between the regulators on a case-by-case basis.
- R 6.11** The Commission recommends that, where one regulator requires the use of expertise possessed by another regulator to assist in their monitoring or enforcement activities, joint action should be employed where appropriate.
- R 6.12** The Commission recommends that regulators should employ common inspectorates only where particular expertise is required that is not readily shared or pooled between regulators and where coordination between existing regulators would be impracticable.

**R 6.13** The Commission recommends that regulators with overlapping jurisdiction but without formal cooperation agreements should avail of information sharing, where appropriate, and to the extent permitted by relevant legislation, including as to data protection.

**R 6.14** The Commission recommends that, in the interest of regulatory independence, network-based voluntary arrangements to achieve coordination between regulators should be preferred to top-down hierarchical approaches.

**R 6.15** The Commission recommends that, where legislation includes provisions that seek to improve coordination between different regulators, it should, where appropriate, provide general guidelines concerning coordination, without prejudice to the capacity of regulators to take the appropriate steps to achieve the desired coordination.

**R 6.16** The Commission recommends that legislation should, where appropriate, having regard to all other relevant legislation including concerning data protection, prescribe the circumstances and purposes for which specified regulators may share certain information with other specified regulators.

**R 6.17** The Commission recommends that, in the interests of accountability, where any instruments are employed to achieve coordination between regulators, the regulators should retain a clear record of the scope of coordination and the relative functions or responsibilities of each regulator.

## Chapter 7 Appeals from Regulatory Decisions

- R 7.01 The Commission recommends that the Irish Financial Services Appeals Tribunal (IFSAT) be retained in its current form.
- R 7.02 The Commission recommends that the right of appeal to the High Court from a decision of IFSAT be limited to an appeal on a point of law only, and that the decision of the High Court on such appeal should be final, subject to the High Court giving leave to state a case to the Court of Appeal.
- R 7.03 The Commission recommends that a standing appeals tribunal to hear appeals from market-affecting decisions of the regulators encompassed by this Report should not be established.
- R 7.04 The Commission recommends that the provisions concerning appeals to appeal panels from market-affecting decisions of the Commission for Aviation Regulation (CAR) and the Commission for the Regulation of Utilities (CRU) should be repealed, and that legislation should instead be enacted in respect of the regulators encompassed by this Report providing for a right of appeal to the High Court from market-affecting decisions of those regulators.
- R 7.05 The Commission recommends that there should be allocated to the establishment of the High Court Regulatory Appeals List such additional resources as will allow the List to operate efficiently and effectively and that, subject to the powers of the President of the High Court as to assignment of judges, a panel of judges should be assigned to the List.
- R 7.06 The Commission recommends that the determination of the High Court (Regulatory Appeals List) should be final, subject to the High Court giving leave to state a case to the Court of Appeal.
- R 7.07 The Commission recommends that the *Rules of the Superior Courts 1986* should be amended to provide for the establishment in the High Court of a Regulatory Appeals List to hear market-affecting decisions of the regulators encompassed by this Report, which should include provisions for admission to the list and for its management comparable to those in Order 63A (Commercial Court List) and Order 63B (Competition Court List) of the 1986 Rules.
- R 7.08 The Commission recommends that, bearing in mind that some appeals from market affecting decisions to the High Court must, as a matter of law (including EU law), involve a full re-hearing, whereas other appeals could be restricted to an appeal on a point of law, it should be made clear in the formula of words used whether the Court is entitled or required to review the factual determinations made by the regulator and to substitute its own conclusion for that of the regulator (a full re-hearing) or whether the Court is limited to determining the appeal on the basis of points of law.



## Chapter 8 Corporate Criminal Liability

**R 8.01** The Commission recommends the enactment of a generally applicable scheme (the corporate scheme) of attributing criminal liability to corporate bodies (which would also apply to other prescribed undertakings), which would involve different approaches depending on the nature of the fault element, if any, in the specific offence in question.

**R 8.02** The Commission recommends that this corporate scheme should provide for different models to attribute liability for the following 3 types of offences: subjective fault based offences (those that involve proof of knowledge, intention, or recklessness); objective fault based offences (those that involve proof of gross negligence, negligence, unreasonableness or comparable terms); and no fault offences (that is, strict liability offences, in which a defence of due diligence is available, and absolute liability offences, in which a defence of due diligence is not available).

**R 8.03** The Commission recommends that the corporate scheme should include an attribution model for subjective fault based offences based on a significantly expanded and reformed model of the identification doctrine.

**R 8.04** The Commission recommends that the subjective fault element of an offence, which is to be attributed to the corporate body, may be identified in a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the offence in question, and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question, but not including a natural person who has simply been given the role of carrying out such policy-related operational authority.

**R 8.05** The Commission recommends that in order for the subjective fault of the identified employee or agent to be attributed to the corporate body, the employee or agent must have acted (whether in committing the conduct element of the offence, delegating that conduct element to another employee or agent, or acquiescing to that conduct element: see recommendation 8.06 below), at least in part, “for the benefit of the corporate body” or “within the scope of his or her activity for the corporate body”.

**R 8.06** The Commission recommends that the subjective fault element of an offence will be attributed to the corporate body in the following circumstances:

- (1) where the identified employee or agent, operating within the scope of his or her authority, is party to an offence; or
- (2) where the identified employee or agent, operating within the scope of his or her authority, delegated the conduct element of the offence to one or more other employees or agents of the corporate body; or
- (3) where the identified employee or agent knowingly fails to take reasonable steps to prevent the conduct element of an offence being perpetrated by one or

more other employees or agents of the corporate body (whether or not he or she is operating within the scope of his or her authority); or

- (4) where the identified employee or agent, operating within the scope of his or her authority, recklessly (with a conscious disregard of risk) fails to take reasonable steps to prevent criminal conduct being perpetrated by one or more other employees or agents of the corporate body.

**R 8.07** The Commission recommends that this corporate scheme should provide for a rebuttable presumption that an identified employee or agent, acting within the scope of his or her authority, is party to an offence (the first ground for liability set out in recommendation 8.06), because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.

**R 8.08** The Commission recommends that this presumption will be raised where the prosecution has demonstrated (to the satisfaction of the evidential standard) that:

- (1) the conduct element of the offence has occurred, and
- (2) this conduct could only have been committed in satisfaction of one of the 4 grounds outlined in recommendation 8.06, and that
- (3) in raising this presumption, the prosecution will not be required to identify a specific employee or agent exercising a delegated operational authority.

**R 8.09** The Commission recommends that it should be provided that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) either that:

- (1) no specific employee or agent, exercising a delegated operational authority, in fact satisfied any of the 4 grounds outlined in recommendation 8.06; or
- (2) the corporate body had taken all reasonable steps to prevent the satisfaction of whichever of the 4 grounds is being relied upon by the prosecution.

**R 8.10** The Commission recommends that the corporate scheme should provide for two separate models for attribution in objective fault based offences: one based upon the gross negligence standard, and one based upon the simple negligence standard.

**R 8.11** The Commission recommends that the gross negligence model should involve the following elements:

- (1) The corporate body was negligent;
- (2) The corporate body's negligence was of a sufficiently high degree to be characterised as "gross" negligence, that is, it fell far below the standard of care required in the circumstances; and

- (3) The negligence resulted in the conduct (that is, consequence) element of the offence in question being satisfied.

**R 8.12** The Commission recommends that the simple negligence model should involve the following elements:

- (1) The corporate body was negligent;
- (2) The negligence resulted in the conduct/consequence element of the offence in question being satisfied.

**R 8.13** The Commission recommends that, in both objective fault models (gross negligence and simple negligence), when assessing whether a corporate body has breached the standard of care, regard should be had to the way in which the organisation's activities are managed or organised by high managerial agents. This should be done by reference to a non-exhaustive list of "corporate culture" factors, such as internal governance and communications systems, the role of "high-managerial agents", compliance (or otherwise) with relevant statutory requirements, and compliance (or otherwise) with relevant statutory codes or guidance from regulators.

**R 8.14** The Commission recommends that the corporate scheme should provide that objective fault based offences that do not use either gross negligence or simple negligence as the fault element should, so far as possible, track onto the most suitable of the two recommended objective fault attribution models.

**R 8.15** The Commission recommends that in the case of offences in which the level of culpability of the fault element is lower than or equal to that of simple negligence, the simple negligence model will apply, and that in the case of offences in which the level of culpability required of the fault element is greater than that of simple negligence, the gross negligence model will apply.

**R 8.16** The Commission recommends that the corporate scheme should provide that strict and absolute liability offences involve the imposition of direct, personal, criminal liability to a corporate body defendant.

**R 8.17** The Commission recommends that the corporate scheme should provide that the conduct element of both strict and absolute liability offences will be attributed to the corporate body using the attribution of conduct elements in recommendations 8.19-8.23 below).

**R 8.18** The Commission recommends that where the defence to a strict liability offence requires proof of certain steps or conduct on the part of the corporate body, these steps can be attributed in the same manner as set out in recommendation 8.20 below.

**R 8.19** The Commission recommends that the corporate scheme should provide for a model for attributing positive criminal conduct to the corporate body and that this should provide for the attribution of positive conduct, which of itself satisfies the conduct element of an offence (in an act based offence), or which causatively results in the satisfaction of the conduct element of an offence (in a result based offence).

**R 8.20** The Commission recommends that the corporate scheme for conduct attribution should provide that the corporate body may have attributed to it the positive criminal acts, or positive conduct which causes a criminal result, of one or more of the corporate body's employees or agents who are:

- (1) acting in the course of their ordinary or reasonably understood business for the body;
- (2) directed, expressly or implicitly, by another employee or agent who is exercising a delegated operational authority; or
- (3) acting for the benefit of the corporate body.

**R 8.21** The Commission recommends that the corporate scheme for conduct attribution should include a rebuttable presumption that the conduct element of the offence has been satisfied, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.

The presumption will be raised once the prosecution has demonstrated (to the satisfaction of the evidential standard) that:

- (1) the positive criminal act or criminal result, which amounts to the conduct element of the offence in question, has occurred; and
- (2) the nature of that act or result is such that the conduct in question was committed by one or more employees or agents of the corporate body (in the case of a criminal act), or it was caused by the conduct of one or more employees or agents of the corporate body (in the case of a criminal result).

In raising this presumption, the prosecution will not be required to identify the specific employee/s or agent/s who perpetrated the conduct in question.

**R 8.22** The Commission recommends that it should be provided that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) that:

- (1) the positive criminal act or conduct which caused a criminal result, which amounts to conduct element of the offence in question, was not committed by an employee or agent of the corporate body; or
- (2) the corporate body had taken all reasonable steps to prevent commission of the conduct in question.

**R 8.23** The Commission recommends that conduct by way of an omission be attributed to the corporate body in the same way as it is to a natural person.

## Chapter 9 Liability of Corporate Managerial Agents

- R 9.01** The Commission recommends the enactment of a statutory scheme of derivative criminal liability (“the derivative scheme”) for managerial agents of corporate bodies (and which would also apply to the managerial agents of other prescribed undertakings) based upon such an agent’s culpable contribution to the substantive offending of that body (or undertaking).
- R 9.02** The Commission recommends that a “managerial agent” should be defined as a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the corporate body; and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question; but not including a natural person who has simply been given the role of carrying out such policy-related operational authority.
- R 9.03** The Commission recommends that the derivative scheme should provide that derivative liability may be imposed upon a managerial agent where that agent’s culpability falls within the range of culpability of either subjective fault or objective fault (subject to recommendation 9.06 on the tracking requirement and recommendation 9.08 on strict liability and no fault liability offences).
- R 9.04** The Commission recommends that the derivative scheme should be formulated so as provide for separate fault and conduct elements.
- R 9.05** The Commission recommends that (subject to recommendation 9.06 on the tracking requirement) the derivative scheme should provide for derivative liability to be imposed where a managerial agent’s culpable contribution to corporate offending is accompanied by one of the following fault elements:
- (1) intention or knowledge;
  - (2) subjective recklessness or wilful blindness;
  - (3) gross negligence; or
  - (4) simple negligence or constructive knowledge.
- R 9.06** The Commission recommends that the levels of fault required of a managerial agent in a specific case under the derivative scheme should track the level of fault that would be required of a principal offender in a prosecution for the substantive offence.
- R 9.07** The Commission recommends that, in a prosecution under the derivative scheme, where the fault requirement of the substantive offence is not identical to one of those listed at recommendation 9.05, the level of fault which must be proved of the managerial agent should be the nearest equivalent that involves at the least a comparable level of culpability.

**R 9.08** The Commission recommends that, where the substantive offence is a strict liability offence or an absolute liability offence, no proof of culpability will be required of a managerial agent in order to impose derivative liability (although the commission of the substantive offence, and the agent's contributory conduct, must still be proved), but an agent will have access to a defence where he or she can establish (to the evidential burden) that:

- (1) he or she was not operating with authority or control in relation to the conduct of the corporate body, or its agents, which forms the basis of the conduct element of the substantive offence; or
- (2) he or she acted reasonably in relation to the operation of his or her authority or control over the conduct of the corporate body, or its agents, as a managerial agent:
  - a. in relation to the corporate body's commission of the conduct element of the substantive offence; or
  - b. in relation to the corporate body's failure to satisfy any defence provided for in relation to substantive offence.

**R 9.09** The Commission recommends that the commission of a substantive offence by a corporate body (or other prescribed undertaking) will be a necessary proof for the imposition of derivative liability to a managerial agent, which forms part of the conduct element of the recommended scheme.

**R 9.10** The Commission recommends that proof of a prosecution or conviction of a corporate body (or other prescribed undertaking) for a substantive offence will not be required in order to impose derivative liability on a managerial agent under this scheme.

**R 9.11** The Commission recommends that the scheme shall provide that, upon proof of a managerial agent's culpable contribution to the substantive offending, a managerial agent shall be guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the substantive offence.

**R 9.12** The Commission recommends that the derivative scheme shall provide that a managerial agent's culpable contribution to the substantive offending will be proved where the prosecution can demonstrate the following conduct on the part of the agent:

- (1) positive acts of agreement to or approval of the substantive offending;
- (2) tacit agreement or acquiescence to the substantive offending; or
- (3) failing to prevent the substantive offending.

**R 9.13** The Commission recommends that the derivative scheme should include a reverse evidential burden provision, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.

**R 9.14 The Commission recommends that the reverse burden provision should include the following elements:**

- (1) A rebuttable presumption will be engaged once the prosecuting entity has satisfied a particular proof (to the satisfaction of the evidential burden);**
- (2) The presumption will be that the managerial agent has satisfied both the fault element and the agent's contributory conduct aspect of the conduct element of the recommended scheme;**
- (3) The managerial agent shall rebut the presumption where he or she can rebut a particular proof (to the satisfaction of the evidential burden).**

**R 9.15 The Commission recommends that, where the substantive offence is a fault based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that:**

- (1) the fault requirement of the derivative scheme has been satisfied; and**
- (2) the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence).**

**R 9.16 The Commission recommends that, where the substantive offence is a strict or absolute liability based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence).**

**R 9.17 The Commission recommends that the reverse burden provision shall be engaged where the prosecution can prove that the managerial agent in question was, at the material time, a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by the body (or undertaking) whose duties included making decisions that, to a significant extent, could have affected the management of the body (or undertaking), or a person who purported to act in any such capacity.**

**R 9.18 The Commission recommends that, in prosecutions under the derivative scheme where the substantive offence is a fault based offence, the presumption placed upon the managerial agent by the reverse burden provision shall be rebutted where the agent can demonstrate that he or she does not satisfy either:**

- (1) the fault element which the prosecuting entity would be required to prove, were the presumption not being relied upon, and, or in the alternative, as the case may be,**
- (2) the contributory conduct aspect of the conduct element of the derivative scheme.**

- R 9.19** The Commission recommends that, in prosecutions under the derivative scheme where the substantive offence is a strict or absolute liability offence, the presumption placed upon the managerial agent by the reverse burden provision shall be rebutted where the agent can demonstrate that he or she does not satisfy the contributory conduct aspect of the conduct element of the derivative scheme.
- R 9.20** The Commission recommends that the derivative scheme should expressly provide that the presumption placed upon the managerial agent by the reverse burden will be rebutted where the requirements set out in recommendations 9.18 and 9.19 are proved by the managerial agent to the satisfaction of the evidential burden.
- R 9.21** The Commission recommends that the derivative scheme should replace existing “consent, connivance or neglect/wilful neglect” provisions where they occur in legislation.
- R 9.22** The Commission recommends that the derivative scheme should also replace existing “aids, abets, counsels or procures” models of secondary liability for managerial agents, but limited to those cases where (a) the primary offender is a corporate body (or other prescribed undertaking) and (b) the defendant is a natural person who falls within the scope of recommendation 13.
- R 9.23** The Commission recommends that the derivative scheme shall not apply to, alter or affect, the application of the officer in default provisions of the *Companies Act 2014*.



## Chapter 10 A Defence of Due Diligence

- R 10.01 The Commission recommends that, having regard to the relevant constitutional provisions, a due diligence type defence should apply to strict liability offences.
- R 10.02 The Commission recommends that the suitable use of strict liability offences is consistent with and can contribute to effective and efficient regulation.
- R 10.03 The Commission recommends that a due diligence defence is appropriate for the corporate liability attribution model recommended in Chapter 8, insofar as it applies to strict liability offences.
- R 10.04 The Commission recommends that a failure to prevent model should be available, on a case-by-case basis, as an alternative to a due diligence model for strict liability offences.
- R 10.05 The Commission recommends that the failure to prevent model should be used only in circumstances where it is not feasible to hold a corporate body or its directing minds liable for a substantive offence.
- R 10.06 The Commission recommends that any due diligence defence, including in a failure to prevent liability model, should feature a general form of due diligence defence which will be satisfied upon a corporate body having taken all reasonable steps and exercised all due diligence to prevent the relevant criminal offence.
- R 10.07 The Commission recommends that the general form of due diligence including that applicable to the failure to prevent model, should be that “a relevant person had taken all reasonable steps and to exercise all due diligence to prevent any relevant criminal activity”.
- R 10.08 The Commissions recommends that where a regulator has jurisdiction in connection with an offence to which a due diligence defence applies, the regulator should provide guidance, which may take the form of a statutory code, setting out measures required to satisfy the due diligence defence.
- R 10.09 The Commission recommends that “relevant person”, in relation to a corporate body, should be defined as:
- (1) a director, manager, secretary or other officer of the corporate body,
  - (2) a person purporting to act in that capacity,
  - (3) a shadow director (comparable to the definition in the *Companies Act 2014*) of the corporate body, or
  - (4) an employee, agent or subsidiary of the corporate body.
- R 10.10 The Commission recommends that any general failure to prevent model of liability should involve imposing criminal liability for either (a) cultural or organisational failings in a corporate body’s systems or policies which result in offending or (b) failures in

supervision by any “relevant person” with policy making responsibilities within the corporate body’s managerial structure.

**R 10.11** The Commission recommends that a corporate body should be held criminally liable for failures to prevent criminal activity only where such activity was carried out for the benefit of the corporate body or for the benefit of a “relevant person” or a client of the corporate body.

**R 10.12** The Commission recommends that a due diligence type defence should be available to “relevant persons” for strict liability type offences.

**R 10.13** The Commission recommends that a due diligence defence should apply to the scheme of derivative managerial agent liability recommended in Chapter 9 insofar as it relates to strict liability offences.

**R 10.14** The Commission recommends that it should remain the case that neither ignorance of the law nor reliance on legal advice should operate as a general defence in criminal law, but that this does not preclude such a defence being provided for in legislation on a case-by-case basis.

**R 10.15** The Commission recommends that in circumstances in which there is evidence to indicate that an individual or corporate body acted in good faith and believed their conduct to be lawful in reliance on bona fide legal advice, such reliance on legal advice may be considered as a mitigating factor at sentencing.

**R 10.16** The Commission recommends that where an instance of officially induced error, including such an error resulting from advice from a regulator, does not prevent the initiation of a criminal prosecution, it should be open to the defendant to raise the instance of officially induced error during the trial, where the advice appears authoritative and reasonable, and where the individuals and corporations have sought in good faith to apply it within the law.

**R 10.17** In order to facilitate the recognition of officially induced error during the course of a trial, where it did not result in a prohibition of the prosecution during a preliminary hearing, the Commission recommends that the trial court may make an order in the form provided for in Head 2(4) of the Revised General Scheme of the Criminal Procedure Bill where the defendant raises officially induced error during the course of the trial.

**R 10.18** The Commission recommends that the defence of duress or “superior orders” should be available only where a threat of death or serious immediate harm is directed towards any person.

**R 10.19** The Commission recommends that while a managerial agent may delegate the function of exercising due diligence, the legal responsibility for exercising due diligence may not be delegated as this remains with the managerial agent.

## Chapter 11 Existing Fraud Offences: The Fault Element and Recklessness

R 11.01 The Commission recommends that the common law offence of conspiracy to defraud be retained.

R 11.02 The Commission recommends that, as current Irish law contains the essential elements of the US mail and wire fraud offences, such offences need not be introduced in this jurisdiction.

R 11.03 The Commission recommends that the definition of “deception” in the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide that for the purposes of that definition “a person deceives if he or she, intentionally or recklessly” engages in the acts subsequently referred to in the 2001 Act.

R 11.04 The Commission recommends that the definition of dishonesty in the *Criminal Law (Theft and Fraud Offences) Act 2001* as acting “without a claim of right made in good faith” should be retained.

R 11.05 The Commission recommends that the offence of unlawful use of a computer in section 9 of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be retained in its current form.

R 11.06 The Commission recommends that the definition of the conduct element of the offences in section 10(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide as follows:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—

- (a) intentionally or recklessly destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose
- (b) intentionally or recklessly fails to make or complete any account or any such document, or
- (c) in furnishing information for any purpose intentionally or recklessly produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.”

R 11.07 The Commission recommends that the definition of the conduct element of the offence in section 11(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined as subjective recklessness), and that it should therefore provide as follows:

**“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, *intentionally or recklessly* destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.”**

## **Chapter 12 Reckless Trading**

- R 12.01** The Commission recommends that egregiously reckless risk-taking should be appropriately criminalised by the inclusion of recklessness (which has been defined as subjective recklessness) within the offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001* as recommended in Chapter 11, above.
- R 12.02** The Commission recommends that, having regard to the recommendations in Chapter 11 concerning recklessness, a criminal offence of reckless trading should not be enacted in Ireland.

## **Chapter 13 Venue for Trials on Indictment for Corporate Offences**

- R 13.01** The Commission recommends that the current statutory arrangements for assigning trials on indictment as between the Circuit Criminal Court and the Central Criminal Court (High Court) should be retained.

## APPENDIX

# DRAFT SCHEMES OF BILLS

1. Draft Scheme of Corporate Crime Agency Bill
2. Draft Scheme of Regulatory Powers Bill
3. Draft Scheme of Corporate Criminal Liability Bill
4. Draft Scheme of Criminal Justice (Theft and Fraud Offences) (Amendment) Bill

## **1. Draft Scheme of Corporate Crime Agency Bill**

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1. Establishment of Corporate Crime Agency
2. Personnel of Agency
3. Functions of Agency
4. Resourcing of Agency
5. Corporate Crime Prosecution Unit
6. Resourcing of Crime Prosecution Unit

## Draft Scheme of Corporate Crime Agency Bill

### DRAFT SCHEME OF BILL

entitled

An Act to provide for the establishment of a Corporate Crime Agency and to provide for related matters.

#### **Head 1: Establishment of Corporate Crime Agency**

Provide for:

the establishment by Order of the Minister for Justice and Equality of the Corporate Crime Agency, in this Act referred to as “the Agency”.

**Explanatory note.** This is a standard provision in legislation providing for the establishment of a statutory body and implements, in part, recommendation R 1.01.

#### **Head 2: Personnel of Agency**

Provide for:

the personnel of the Agency shall comprise multi-disciplinary personnel, such as:

- (a) experienced forensic accountants who can assess whether accounts-related frauds or other wrongdoing may have occurred;
- (b) experienced Revenue Commissioners officials and Department of Employment Affairs and Social Protection officials who can assess whether taxation or social welfare related fraud or wrongdoing may have occurred;
- (c) experienced members of An Garda Síochána who are familiar with the procedures to be put in place in the context of preparing a file for prosecution, including:
  - (i) the preparation of documents to form the book of evidence,
  - (ii) retention of material that may need to be disclosed to the defence and
  - (iii) formal questioning of potential accused persons; and
- (d) experienced criminal practitioners who can assess what precise offences may have occurred and what steps are needed to prepare a case for trial.

**Explanatory note.** This implements the main elements of recommendation R 1.01, which commends the proposal in the November 2017 policy document *Measures*

to Enhance Ireland's Corporate, Economic and Regulatory Framework to "establish a new independent Agency to greater enhance the State's ability to undertake modern, complex corporate law enforcement"; and in which the Commission recommends that the proposed Agency should be established on a statutory basis and should be a multi-disciplinary body with a range of personnel similar to, though not identical to, the multi-disciplinary personnel in the Criminal Assets Bureau, established by the *Criminal Assets Bureau Act 1996*.

### **Head 3: Functions of Agency**

Provide for:

- (a) the Agency shall have power to investigate corporate criminal offences independently of any referrals it may receive from prescribed financial or economic regulators, and
- (b) the Agency shall establish co-ordination and cooperation agreements with prescribed financial or economic regulators.

**Explanatory note.** This implements, in part, recommendation R 1.02; and the reference to "prescribed financial or economic regulators" reflects that the Commission's Report took account of 8 specific regulators, without prejudice to the recommendations being applied to other comparable regulators.

### **Head 4: Resourcing of Agency**

Provide for:

sufficient resourcing of the Agency to carry out its functions.

**Explanatory note.** This implements, in part, recommendation R 1.02. The Report notes that the detailed arrangements as to resourcing of the proposed Agency are outside the role of the Law Reform Commission and require decisions by the Government and Oireachtas.

### **Head 5: Corporate Crime Prosecution Unit**

Provide for:

a dedicated prosecution unit for corporate offences within the Office of the Director of Public Prosecutions to work in close liaison with the Agency to ensure that the most efficient processes are in place to prepare a prosecution on indictment for corporate offences in accordance with the relevant principles and rules applicable to a trial on indictment.



**Explanatory note.** This implements, in part, recommendation R 1.03 on the establishment of a dedicated prosecution unit for corporate offences within the Office of the Director of Public Prosecutions.

**Outline Head 6: Resourcing of Crime Prosecution Unit**

Provide for:

sufficient resourcing of the Crime Prosecution Unit to carry out its functions.

**Explanatory note.** This implements, in part, recommendation R 1.03. As with recommendation R1.02, above, the Report notes that the detailed arrangements as to resourcing of the proposed Crime Prosecution Unit are outside the role of the Law Reform Commission and require decisions by the Government and Oireachtas.

## 2. Draft Scheme of Regulatory Powers Bill

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## Draft Scheme of Regulatory Powers Bill

### DRAFT SCHEME OF BILL

entitled

An Act to provide for additional regulatory powers for prescribed regulatory bodies<sup>1</sup> and to provide for related matters.

### Part 1 Core Regulatory Powers and Regulatory Guidance Office

#### Head 1: Common Template of Core Regulatory Powers

Provide for:

- (a) a common legislative template of core regulatory powers for similarly situated financial and economic regulators, comprising at least the following list of core powers:
  - (i) power to issue a range of warning directions or notices, including to obtain information by written request and “cease and desist” notices;
  - (ii) power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;
  - (iii) power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents (including provision for determining issues of privilege);
  - (iv) power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);
  - (v) power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes;
  - (vi) power to bring summary criminal prosecutions (prosecutions on indictment are
- (b) the common legislative template of core powers shall be used to facilitate the use of a common formula of words when conferring financial and economic regulators particular powers, and to avoid any gaps identified through case law

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<sup>1</sup> The reference to “prescribed regulatory bodies” reflects that the Commission’s Report took account of 8 specific regulators, without prejudice to the recommendations in the Report being applied to other comparable regulators. Since the Commission’s Report has recommended that it would not be appropriate at this time to enact a single Regulatory Powers Act, it is envisaged that the recommendations on regulatory powers, if implemented, would be enacted in separate legislation applicable to each regulatory body on a case-by-case basis.

**Explanatory note.** Paragraph (a) implements recommendations R 2.01 and R 2.02, that there should be a common set of core regulatory powers – a “core regulatory toolkit” – for all similarly situated financial and economic regulators. Paragraph (b) implements recommendation R 2.03, which recommends that the common set of core regulatory powers should be used to facilitate the use of a common formula of words when conferring particular powers on financial and economic regulators, and to avoid any gaps identified through case law such as in the Supreme Court decision *CRH Plc & Ors v Competition and Consumer Protection Commission* [2017] IESC 34. Note also that in recommendation R2.04, the Commission recommends that the common legislative template of powers in Recommendation R2.01 could form the basis for a single Regulatory Powers Act (as has been enacted in some jurisdictions) but the Commission does not consider that such an Act is appropriate at this time.

## **Head 2: Regulatory Guidance Office**

Provide for:

- (a) the establishment of a Regulatory Guidance Office;
- (b) the membership of the Regulatory Guidance Office shall include representatives of Government Departments and Regulators;
- (c) the remit of the Regulatory Guidance Office shall be to provide guidance and information on regulatory matters, including:
  - (i) national and international best practice in economic regulation,
  - (ii) the content of Regulatory Impact Assessments (or comparable documents) and
  - (iii) lessons learned from relevant case law.

**Explanatory note.** This implements recommendation R2.05 on establishing a Regulatory Guidance Office. The Report notes that comparable functions were carried out by the former Better Regulation Unit.

## **Part 2 Administrative Financial Sanctions**

### **Head 3: Administrative Financial Sanctions may be imposed by financial and economic regulators**

Provide for:

prescribed financial and economic regulators may, subject to the requirements in this Part, impose Administrative Financial Sanctions.

**Explanatory note.** This implements recommendations R3.01 and R3.02 that, subject to the principles and procedural safeguards in the Report (as set out in the Heads below), financial and economic regulators should be conferred with the

power to impose Administrative Financial Sanctions. A notable requirement in this respect is that an Administrative Financial Sanction is subject to approval of the High Court, which the Commission recommends is required to meet constitutional requirements. In Recommendation R 3.03, the Commission also recommended that, subject to a number of specific recommendations as to reform, the statutory regime under which the Central Bank imposes Administrative Financial Sanctions provides a suitable general model for the financial and economic regulators encompassed by this Report.

#### **Head 4: Maximum limits of Administrative Financial Sanctions**

Provide for:

the maximum limits of an Administrative Financial Sanction that may be imposed shall be:

- (a) for a corporate body, €10 million, or 10% of annual turnover in the preceding year, whichever is the greater;
- (b) for an individual, €1 million.

**Explanatory note.** This implements recommendations R 3.04, R 3.33 and R 3.34, that the maximum limits of an Administrative Financial Sanction should be modelled on the general maxima provided for under the Central Bank's comparable regime.

#### **Head 5: Administrative Financial Sanctions shall include provision for removal of any economic benefit**

Provide for:

- (a) where an Administrative Financial Sanction is imposed, it shall include removal of any economic benefit derived from a regulatory breach; and
- (b) the Administrative Financial Sanction may include a sum up to a maximum of twice the amount of economic benefit gained from the breach.

**Explanatory note.** This implements recommendations R 3.05 R 3.06 and R 3.32 that the Administrative Financial Sanction is to include removal of any economic benefit derived from a regulatory breach; and that this may include a sum up to a maximum of twice the amount of economic benefit gained from the breach.

#### **Head 6: Legal Costs Assistance Scheme**

Provide for:

- (a) a legal costs assistance scheme for the Administrative Financial Sanctions process for each specified regulator;
- (b) the details of a legal costs assistance scheme shall be prescribed in Regulations.

**Explanatory note.** This implements recommendation R3.07 on a legal costs assistance scheme for the Administrative Financial Sanctions process, the details of which are to be set out in Regulations.

#### **Head 7: information exchange barriers between supervisory and enforcement activities within regulators**

Provide for:

information exchange barriers to be erected between those involved in supervisory and enforcement activities in the prescribed regulators.

**Explanatory note.** This implements recommendation R3.08 on the need for information exchange barriers between those involved in supervisory and enforcement activities in the prescribed regulators.

#### **Head 8: Administrative Financial Sanctions process: general**

Provide for:

- (a) the hearing by which an Administrative Financial Sanction may be imposed, referred to as the “Adjudicative Panel Process”, shall be based on an adversarial model,
- (b) the hearing shall involve an internal investigatory unit of the specified regulator presenting its case on an adversarial basis to an externally-sourced Adjudicative Panel, and
- (c) the party being investigated shall be entitled to be represented and heard.

**Explanatory note.** This implements recommendation R3.09, that the Administrative Financial Sanctions process, including for the Central Bank, should be modelled on the processes used in the disciplinary bodies for the legal and medical professions.

#### **Head 9: Adjudicative Panel for Administrative Financial Sanctions process**

Provide for:

- (a) the externally-sourced Adjudicative Panel shall be an internal entity within the specified regulators;
- (b) each specified regulator shall establish a committee to be referred to as the “Adjudicative Panel Committee” with the following elements:
  - (i) the membership of the Adjudicative Panel Committee shall be persons external to the regulator;
  - (ii) the membership of the Adjudicative Panel Committee shall be in a ratio of 2:1 between “suitably qualified” individuals and legally qualified persons, each of more than 10 years standing; and



- (iii) the membership of the Adjudicative Panel Committee shall contain a sufficient number of persons to avoid conflicts of interests in the make-up of a specific 3 person Committee.

**Explanatory note.** Paragraph (a) implements recommendation R3.10, that the externally-sourced Adjudicative Panel is to be an internal entity within the specified regulators. Paragraph (b) implements recommendation R3.11 concerning the membership of the Adjudicative Panel Committee.

#### **Head 10: Notice of Adjudicative Panel hearing**

Provide for:

- (a) the specified regulator shall give notice in writing to the regulated entity of the proposed Adjudicative Panel hearing;
- (b) the notice shall specify:
  - (i) the grounds on which the regulator's suspicions of a regulatory breach are based,
  - (ii) specify a date, time and place at which the regulator will hold the hearing, and
  - (iii) invite the regulated entity to attend the hearing or to make written submissions about the matter to which the hearing relates.

**Explanatory note.** This implements recommendation R3.12 on the terms of the notice of a proposed Adjudicative Panel hearing.

#### **Head 11: Procedure and evidence at Adjudicative Panel Committee hearing**

Provide for:

- (a) the Adjudicative Panel Committee hearing shall be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow;
- (b) at the Adjudicative Panel Committee hearing, the rules of procedural fairness shall be followed, but it shall not be bound by all the rules of evidence;
- (c) the standard of proof at the Adjudicative Panel Committee hearing shall be on the balance of probabilities;
- (d) the person presiding at an Adjudicative Panel Committee hearing shall have the power to require a witness at the hearing to answer a question put to the witness, and to require a person appearing at the hearing to produce specified documents;
- (e) the person presiding at the Adjudicative Panel Committee hearing shall have the power to allow a witness at the hearing to give evidence by tendering a written statement, which, if the person presiding so requires, must be verified by oath or affirmation;

- (f) the Adjudicative Panel Committee have the same powers of a judge of the High Court when hearing civil proceedings as to the examination of witnesses, including witnesses who are outside the State;
- (g) a person who is summoned to appear before an Adjudicative Panel Committee hearing shall be entitled to the same rights and privileges as a witness appearing in civil proceedings before the High Court;
- (h) a person who obstructs an Adjudicative Panel Committee in the exercise of its hearing powers without reasonable excuse, or who fails to comply with a requirement or request made by the Adjudicative Panel Committee, or who, in purported compliance with such a requirement or request, gives information that the person knows to be false or misleading, or who refuses to comply with a summons to attend before, or to be examined on oath or affirmation by, the Adjudicative Panel Committee, commits an offence.

**Explanatory note.** This implements recommendations R3.13 to R.3.20, which concern the provisions on the procedure to be followed and the arrangements concerning the taking of evidence at an Adjudicative Panel Committee hearing. These are modelled on comparable provisions for similar adjudicative bodies.

#### **Head 12: Report to High Court following hearing of Adjudicative Panel Committee**

Provide for:

- (a) following the hearing, the Adjudicative Panel Committee shall make a report to the High Court, which shall address, insofar as they are applicable and appropriate, the following matters:
  - (i) the alleged regulatory breaches which required the hearing before the Adjudicative Panel Committee and
  - (ii) the Adjudicative Panel Committee's findings in relation to each of those breaches;
  - (iii) a note on the evidence given to the Adjudicative Panel Committee;
  - (iv) the Adjudicative Panel Committee's recommendation as to appropriate sanction; and
  - (v) any other matters which the Adjudicative Panel Committee may think fit to report.
- (b) both the regulator and the regulated entity may submit written submissions and affidavits to the High Court.

**Explanatory note.** Paragraph (a) implements recommendation R3.21 concerning the content of the report that an Adjudicative Panel Committee is to make to the High Court after a hearing. Paragraph (b) implements recommendation R3.22 that both parties, the regulator and the regulated entity, may submit written submissions and affidavits to the High Court.

### **Head 13: Power of High Court following hearing of Adjudicative Panel Committee**

Provide for:

- (a) the High Court, based on the report of the Adjudicative Panel Committee, the submissions and affidavits presented to it, shall either approve the decision of the Adjudicative Panel Committee or to refuse such approval;
- (b) the High Court may, therefore:
  - (i) approve the decision of the Adjudicative Panel Committee, in which case the decision shall have effect, subject to an appeal under *Head 14*, or
  - (ii) not approve the decision of the Adjudicative Panel Committee, in which case the High Court shall remit the matter to the Adjudicative Panel Committee, which may include remittal subject to directions whether on substantive matters or procedural matters.

**Explanatory note.** This implements recommendation R 3.23 concerning the role of the High Court as to the Adjudicative Panel Committee's decision. The Commission recommends that the High Court may either (a) approve the Adjudicative Panel Committee's decision, in which case the matter has come to an end, subject to appeal (see *Head 14*, below), or (b) not approve the Adjudicative Panel Committee's decision, in which case the High Court remits the matter to the Adjudicative Panel Committee, and this may include remittal subject to directions on, for example, substantive points or procedural points.

### **Head 14: Appeal from High Court to Court of Appeal**

Provide for:

appeal of decisions of the High Court to the Court of Appeal on a point of law of general public importance or where the interests of justice require such an appeal.

**Explanatory note.** This implements recommendation R 3.24, that provision be made for the appeal of decisions of the High Court to the Court of Appeal on a point of law of general public importance or where the interests of justice require such an appeal.

### **Head 15: Legal assistance at Adjudicative Panel Committee hearing**

Provide for:

- (a) the regulatory body, the Adjudicative Panel Committee and the regulated entity may be assisted by a legal practitioner at the hearing of the Adjudicative Panel Committee

- (b) the details of the arrangements for assistance by a legal practitioner shall be prescribed in Regulations.

**Explanatory note.** This implements recommendation R 3.25, that the regulatory body, the Adjudicative Panel Committee and the regulated entity may be assisted by a legal practitioner at the hearing, the details of which are to be set out in Regulations.

#### **Head 16: Costs of investigation and Adjudicative Panel Committee hearing**

Provide for:

- (c) the Adjudicative Panel Committee may award costs in connection with the investigation and the hearing by the Adjudicative Panel Committee;
- (d) the details of the arrangements for awards of costs shall be prescribed in Regulations.

**Explanatory note.** This implements recommendation R 3.26, which recommends that there should be an express power of the Adjudicative Panel Committee to award costs in connection with investigations and hearings, the details of which may be set out in regulations.

#### **Head 17: Publication of details of Administrative Financial Sanction**

Provide for:

- (a) where an Administrative Financial Sanction is imposed, the regulatory body shall publish details on the sanction in such form and manner as is appropriate, including on the regulatory body's website.
- (b) the following terms shall be included in the published statement outlining the sanction imposed:
  - (i) the name of the regulated entity or individual on whom a sanction has been imposed;
  - (ii) the nature of the breach in respect of which the sanction has been imposed and the specific provision which the regulated entity or individual has contravened;
  - (iii) details of the sanction imposed, including the sanction amount and the criteria relevant to the figure arrived at; and
  - (iv) the grounds on which the finding of a contravention is based.
- (c) where it is necessary to exclude any information in the published statement, this should be done to the minimum extent possible to prevent any unfair prejudice from arising;
- (d) where any elements of the Administrative Financial Sanction have initially been omitted from the published statement, and where subsequently publication would no longer unfairly prejudice the regulated entity, individual or other third party, a supplementary public statement shall be published including the previously omitted elements.

**Explanatory note.** Paragraph (a) implements recommendation R 3.27, that, in the interests of transparency and accountability, where an Administrative Financial Sanction is imposed, the regulatory body shall publish details on the sanction in such form and manner as is appropriate, including on the regulatory body's website. Paragraph (b) implements recommendation R 3.28 concerning the minimum details that must be included in the public statement outlining the sanction imposed. Paragraph (c) implements recommendation R3.29 that, where it is necessary to exclude any information in the public statement, this should be done to the minimum extent possible to prevent any unfair prejudice from arising. Paragraph (d) implements recommendation R 3.30 that, where any elements of the Administrative Financial Sanction have initially been omitted from the public statement, and where subsequently publication would no longer unfairly prejudice the regulated entity, individual or other third party, a supplementary public statement shall be published including the previously omitted elements.

#### **Head 18: Criteria to determine appropriate level of Administrative Financial Sanction**

Provide for:

in determining the appropriate level of Administrative Financial Sanction, the Adjudicative Panel Committee shall be required to take into account all relevant circumstances, including, where appropriate:

- (a) the gravity and the duration of the breach;
- (b) the degree of responsibility of the natural or legal person responsible for the breach;
- (c) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;
- (d) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined;
- (e) the losses for third parties caused by the breach, insofar as they can be determined;
- (f) the level of cooperation of the natural or legal person responsible for the breach with the competent authority;
- (g) previous breaches by the natural or legal person responsible for the breach; and
- (h) any action taken to mitigate the damage caused by the breach.

**Explanatory note.** This implements recommendation R 3.31 concerning the detailed criteria which the Adjudicative Panel Committee must take into account in determining the appropriate level of Administrative Financial Sanction. These criteria are intended to ensure that the sanction is proportionate, taking account of all relevant circumstances, and they reflect existing statutory and non-statutory criteria used by the Central Bank, including those derived from EU law in this area.

**Head 19: Administrative Financial Sanction to avoid corporate or personal insolvency**

Provide for:

- (a) in the case of an Administrative Financial Sanction as applied to a legal person, an overriding requirement is that the level of the sanction shall not be so high that it would be likely to cause the regulated entity to cease business;
- (b) in the case of an Administrative Financial Sanction as applied to a natural person, an overriding requirement is that the level of the sanction should not be so high that it would be likely to cause the person to be adjudicated bankrupt.

**Explanatory note.** This implements recommendations R 3.35 and R3.36, that an Administrative Financial Sanction as applied to a corporate body or an individual should not be so high that it would be likely to cause the regulated entity to cease business or to cause the individual to be adjudicated bankrupt.

**Head 20: Regulators to publish guidance on enforcement policy and use of Administrative Financial Sanctions**

Provide for:

each regulatory body shall publish guidance on its enforcement policy and its use of Administrative Financial Sanctions.

**Explanatory note.** This implements recommendation R 3.37 that each regulatory body should be required to publish guidance on its enforcement policy and use of administrative financial sanctions. This reflects existing best practice of regulatory bodies.

**Part 3 Regulatory Enforcement Agreements**

**Head 21: Regulators may enter into Regulatory Enforcement Agreement to settle Administrative Financial Sanctions proceedings**

Provide for:

prescribed financial and economic regulators may, subject to the requirements in this Part, enter into a Regulatory Enforcement Agreement with a regulated entity or an individual as a means to settle Administrative Financial Sanctions proceedings.

**Explanatory note.** This implements recommendation R 4.02 that regulators within the scope of this Report should be provided with the power, subject to the requirements in this Part, to enter into Regulatory Enforcement Agreements (REAs) as a means to settle Administrative Financial Sanctions proceedings with a regulated entity or an individual.

## **Head 22: Regulatory Enforcement Agreement to be used only where appropriate**

Provide for:

a regulator shall only enter into a Regulatory Enforcement Agreement with a regulated entity or individual in respect of an enforcement action where the regulator is of the opinion that it is appropriate to do so, having regard to:

- (a) the regulator's enforcement objectives,
- (b) the circumstances of the breach and the interests of justice, and
- (c) any other relevant matters.

**Explanatory note.** This implements recommendation R 4.03, that a regulator should only enter into REAs with the regulated entity or individual in respect of an enforcement action where the regulator is of the opinion that it is appropriate to do so, having regard to the regulator's enforcement objectives, the circumstances of the breach and the interests of justice, and any other relevant matters.

## **Head 23: Responsibility for entering into negotiations for Regulatory Enforcement Agreement**

Provide for:

The regulator, or its internal enforcement department, as the case may be, shall be responsible for entering into negotiations for a Regulatory Enforcement Agreement with the regulated entity or individual.

**Explanatory note.** This implements recommendation R 4.04, that the regulator, or its internal enforcement department, as the case may be, shall be responsible for entering into negotiations for an REA with the regulated entity or individual.

## **Head 24: Restriction on other enforcement process where Regulatory Enforcement Agreement made in good faith**

Provide for:

Where a Regulatory Enforcement Agreement has been entered into between the regulator and regulated entity or individual, no other enforcement process shall be available to the regulator in respect of the facts that gave rise to the Regulatory Enforcement Agreement, where those facts are set out in good faith by the regulated entity or individual in their disclosures to the regulator.

**Explanatory note.** This implements recommendation R 4.05, that, once an REA has been entered into between the regulator and regulated entity or individual, no other enforcement process should be available to the regulator in respect of the facts that gave rise to the REA, where those facts are set out in good faith by the regulated entity or individual in their disclosures to the regulator.

### **Head 25: Prohibition on use of Regulatory Enforcement Agreement where other enforcement processes have been concluded**

Provide for:

Where any enforcement action, including an Administrative Financial Sanctions proceeding, has been concluded by the regulator in respect of a prescribed contravention, it shall not be permissible for the regulator to enter into a Regulatory Enforcement Agreement with the regulated entity or individual in respect of the facts that gave rise to the other enforcement action.

**Explanatory note.** This implements recommendation R 4.06, that once enforcement action, such as an Administrative Financial Sanctions proceeding, has been concluded by the regulator in respect of a prescribed contravention, it shall not be possible for the regulator to enter into an REA with the regulated entity or individual in respect of the facts that gave rise to the other enforcement action.

### **Head 26: Criteria to determine appropriate level of financial sanction in Regulatory Enforcement Agreement**

Provide for:

Subject to the provisions in *Head 27* as to the level of discount, a regulator, in calculating the level of the financial sanction to be agreed as a result of a Regulatory Enforcement Agreement, shall be required to take into account all relevant circumstances including, where appropriate, any and all of the criteria in *Head 18* that it is required to take into account in respect of determining the appropriate level of an Administrative Financial Sanction.

**Explanatory note.** This implements recommendation R 4.07 that, subject to the provisions in *Head 27* as to the level of discount, in calculating the level of the financial sanction to be agreed as a result of a Regulatory Enforcement Agreement, a regulator should be required to take into account all relevant circumstances including, where appropriate, any and all of the factors that it would have taken into account when deciding the appropriate level of Administrative Financial Sanction, and which are set out in *Head 18*, above.

### **Head 27: Maximum discount of financial sanction in Regulatory Enforcement Agreement**



Provide for:

- (a) Where a Regulatory Enforcement Agreement is agreed with the regulator within the first time period prescribed by the regulator, the regulator may impose a maximum discount of 30% of the financial sanction that would have been imposed as an Administrative Financial Sanction;
- (b) Where a Regulatory Enforcement Agreement is agreed with the regulator after the expiry of the time period prescribed by the regulator, but before the end of the second time period prescribed by the regulator, the regulator may impose a maximum discount of 10% of the financial sanction that would have been imposed as an Administrative Financial Sanction.
- (c) Without prejudice to paragraphs (a) and (b), in the calculation of the financial sanction element of a Regulatory Enforcement Agreement, any discount shall not apply to the portion of the sanction that relates to the removal of the economic benefit derived from a regulatory breach.

**Explanatory note.** Paragraph (a) implements recommendation R 4.08, that, if the REA is agreed with the regulator within the first time period prescribed by the regulator, the regulator may impose a maximum discount of 30% of the financial sum that would have been imposed as an Administrative Financial Sanction. Paragraph (b) implements recommendation R 4.09, that if the REA is agreed with the regulator after the expiry of the time period prescribed by the regulator, but before the end of the second time period prescribed by the regulator, the regulator may impose a maximum discount of 10% of the financial sum that would have been imposed as an Administrative Financial Sanction. Paragraph (c) implements recommendation R 4.10 that, in the calculation of the financial sanction element of a Regulatory Enforcement Agreement, any discount should not apply to the portion of the sanction that relates to the removal of the economic benefit derived from a regulatory breach.

## **Head 28: Regulatory Enforcement Agreement shall be evidenced in writing**

Provide for:

The terms of a Regulatory Enforcement Agreement, agreed between the regulator and the regulated entity, shall be evidenced in writing.

**Explanatory note.** This implements recommendation R 4.11, that the terms of a Regulatory Enforcement Agreement, agreed between the regulator and the regulated entity, must be evidenced in writing.

## **Head 29: Conditions for entering into Regulatory Enforcement Agreement**

Provide for:

- (a) it shall be a precondition of entering into a Regulatory Enforcement Agreement that the regulated entity or, as the case may be, the individual accept responsibility for the contravention involved;
- (b) without prejudice to *Head 36*, it shall not be a requirement of a Regulatory Enforcement Agreement, being a voluntary agreement, that it be confirmed by the High Court for it to come into operation;
- (c) negotiations between the regulator and the regulated entity or individual concerning the terms of a Regulatory Enforcement Agreement shall be undertaken on a “without prejudice” basis, in respect of the disclosures made by the regulated entity and also the capacity of the regulator to use other enforcement processes;
- (d) it shall be a precondition for the initiation of negotiations between the regulator and the regulated entity, or as the case may be an individual, that all parties to the negotiations shall agree that neither the contents of the negotiations, nor the fact that negotiations are taking place, are to be disclosed while the parties are conducting the negotiations; and
- (e) negotiations between the regulator and the regulated entity or individual, concerning the implementation of a Regulatory Enforcement Agreement shall be conducted otherwise than in public.

**Explanatory note.** This implements recommendations R 4.12 to R 4.16 concerning the conditions related to entering into an REA. Paragraph (a) implements recommendation R4.12, that the regulated entity or individual must, in entering into an REA, accept responsibility for the contravention involved. Paragraph (b) implements recommendation R 4.13, that, without prejudice to *Head 36*, below, it should not be a requirement of a Regulatory Enforcement Agreement, bearing in mind that it is a voluntary agreement, that it be confirmed by the High Court for it to come into operation. Paragraph (c) implements recommendation R 4.14, that negotiations between the regulator and the regulated entity or individual concerning the terms of a Regulatory Enforcement Agreement should be undertaken on a “without prejudice” basis, in respect of the disclosures made by the regulated entity and also the regulator’s capacity to use other enforcement tools. Paragraph (d) implements recommendation R 4.15, that, as a precondition for the initiation of negotiations between the regulator and the regulated entity or individual, all parties to the negotiations shall agree that neither the contents of the negotiations, nor the fact that negotiations are taking place, are to be disclosed while the parties are conducting the negotiations. Paragraph (e) implements recommendation R 4.16, that negotiations between the regulator and the regulated entity or individual, concerning the implementation of a Regulatory Enforcement Agreement shall be conducted otherwise than in public.

### **Head 30: Publication of details of Regulatory Enforcement Agreement**

Provide for

- (a) where the regulator enters into a Regulatory Enforcement Agreement with a regulated entity or individual, it shall be accompanied by a detailed

- public statement, outlining the terms and objectives of the Regulatory Enforcement Agreement;
- (b) the following terms shall be included in the published statement outlining the terms of the Regulatory Enforcement Agreement, unless publication of one or more of the terms from the public statement would unfairly prejudice the interests of the regulated entity or individual concerned or those of a third party:
- (i) The name of the regulated entity or individual reaching the settlement with the regulator;
  - (ii) The nature of the breach and the specific provision that the regulated entity or individual has contravened;
  - (iii) That the regulated entity or individual accepts responsibility for the breach;
  - (iv) The level of the monetary sanction agreed, including the criteria relevant to the figure arrived at;
  - (v) The level of discount applied, if any, and the reasons for the level of discount; and
  - (vi) The amount of any compensation payments and the nature of remedial action, such as a redress scheme, agreed as part of the settlement, if any.
- (c) where it is necessary for the regulator to exclude any of the information set out in paragraph (b), this should be done to the minimum extent possible to prevent any unfair prejudice from arising;
- (d) where one or more of the terms of the Regulatory Enforcement Agreement has or have been omitted from the published statement as originally published, but where subsequently during the term of operation of the Regulatory Enforcement Agreement publication would no longer unfairly prejudice the regulated entity, individual or other third party, the regulator shall publish a supplementary public statement including the previously omitted term or terms, provided that, in all cases, the passage of time would not make this obligation unduly burdensome on the regulator.

**Explanatory note.** Paragraph (a) implements recommendation R 4.17, that, in the interests of transparency and accountability, where the regulator enters into a Regulatory Enforcement Agreement with a regulated entity, this agreement shall be accompanied by a detailed public statement, outlining the terms and objectives of the Regulatory Enforcement Agreement. Paragraph (b) implements recommendation R 4.18 concerning the minimum details that must be included in the public statement outlining the sanction imposed. Paragraph (c) implements recommendation R4.19 that, where it is necessary to exclude any information in the public statement, this should be done to the minimum extent possible to prevent any unfair prejudice from arising. Paragraph (d) implements recommendation R 4.20 that, where any terms of the Administrative Financial Sanction have initially been omitted from the public statement, and where subsequently publication would no longer unfairly prejudice the regulated entity, individual or other third party, a supplementary public statement shall be published including the previously omitted terms, provided that, in all cases, the

passage of time would not make this obligation unduly burdensome on the regulator.

**Head 31: Regulatory Enforcement Agreement may include financial compensation, including redress scheme**

Provide for:

- (a) as part of a Regulatory Enforcement Agreement, a regulator may agree financial compensation payments to be paid by the regulated entity responsible for the breach, to any victims of the breach, including by means of a redress scheme;
- (b) such financial compensation payments in a Regulatory Enforcement Agreement shall be excluded from the calculation of the discount, if any, of the financial sanction to be imposed on the regulated entity.

**Explanatory note.** Paragraph (a) implements recommendation R4.21, that, as part of an REA, a regulator should have the express power to agree financial compensation payments to be paid by the regulated entity responsible for the breach, to any victims of the breach, including by means of a redress scheme. Paragraph (b) implements recommendation R 4.22 that such financial compensation element of an REA should be excluded from the calculation of the discount, if any, of the financial sanction to be imposed on the regulated entity. This is because the compensation is restorative rather than retributive, and the amount required to compensate victims of the regulatory breach should not be dependent on the co-operation or previous record of good conduct on the part of the regulated entity.

**Head 32: Financial compensation in Regulatory Enforcement Agreement: provisos**

Provide for

- (a) where financial compensation of victims is included in a Regulatory Enforcement Agreement, in calculating the level of this compensation no regard is to be had to the upper monetary limit or percentage of annual turnover or income that may be imposed on the regulated entity or individual;
- (b) where financial compensation of victims is included in a Regulatory Enforcement Agreement, the regulator, in calculating the overall amount of this compensation to victims (to the extent that this is possible at the time the Regulatory Enforcement Agreement is entered into), shall endeavour to ensure that that overall amount, combined with any other financial sanction that is agreed, is not so high as would be likely to cause the regulated entity to cease business or the individual to be adjudicated bankrupt.

**Explanatory note.** Paragraph (a) implements recommendation R 4.23 that where financial compensation of victims of contraventions is included in a Regulatory Enforcement Agreement, in calculating the level of this compensation, no regard is to be had to the upper monetary limit or percentage of annual turnover or income that may be imposed on the regulated entity or individual. Paragraph (b) implements recommendation R 4.24 that where financial compensation of victims is included as part of a Regulatory Enforcement Agreement, the regulator, in calculating the overall amount of this compensation to victims (to the extent that this is possible at the time the Regulatory Enforcement Agreement is entered into), shall endeavour to ensure that that overall amount, combined with any other financial sanction that is agreed, is not so high as would be likely to cause the regulated entity to cease business or the individual to be adjudicated bankrupt.

### **Head 33: Variation of Regulatory Enforcement Agreement**

Provide for:

- (a) variation of a Regulatory Enforcement Agreement, subject to paragraph (b) and the other requirements of this Part, where the regulator considers that it is appropriate to vary the terms of the original agreement, having regard to its enforcement objectives and the general principles applicable to Regulatory Enforcement Agreements;
- (b) without prejudice to paragraph (a), the terms of a Regulatory Enforcement Agreement may be varied where circumstances outside the control of either party to it have subsequently arisen to the extent that it would not be in the interests of justice to continue to enforce the terms of the original Regulatory Enforcement Agreement and where the regulator and the regulated entity or individual concerned each consent to the variation.

**Explanatory note.** Paragraph (a) implements recommendation R 4.25, that Regulatory Enforcement Agreements should be capable of variation, subject to the criteria set out in this Part, where the regulator considers that it is appropriate to vary the terms of the original agreement, having regard to its enforcement objectives and the general principles applicable to Regulatory Enforcement Agreements. Paragraph (b) implements recommendation R 4.26, that the terms of a Regulatory Enforcement Agreement may be varied where circumstances outside the control of either party to it have subsequently arisen to the extent that it would not be in the interests of justice to continue to enforce the terms of the original Regulatory Enforcement Agreement and where the regulator and the regulated entity or individual concerned each consent to the variation.

### **Head 34: Failure to comply with Regulatory Enforcement Agreement**

Provide for:

- (a) where a regulated entity or individual fails to comply with any of the terms of the Regulatory Enforcement Agreement, the regulator may apply to the High Court for an order requiring the regulated entity or individual to comply with that term;
- (b) where the High Court is satisfied that the regulated entity or individual has failed to comply with any of the terms of the Regulatory Enforcement Agreement, the Court may make an order requiring the regulated entity or individual to comply with that term

**Explanatory note.** Paragraph (a) implements recommendation R 4.27, that where a regulated entity or individual fails to comply with any of the terms of the Regulatory Enforcement Agreement, the regulator may apply to the High Court for an order requiring the regulated entity or individual to comply with that term. Paragraph (b) implements recommendation R 4.28, that where the High Court is satisfied that the regulated entity or individual has failed to comply with any of the terms of the Regulatory Enforcement Agreement, the Court may make an order requiring the regulated entity or individual to comply with that term.

### **Head 35: Recovery of sum due under Regulatory Enforcement Agreement as debt**

Provide for:

A regulator may, by proceedings brought in a court of competent jurisdiction, recover as a debt due to the regulator any amount agreed to be paid under a Regulatory Enforcement Agreement.

**Explanatory note.** This implements recommendation R 4.29, that a regulator may, by proceedings brought in a court of competent jurisdiction, recover as a debt due to the regulator any amount agreed to be paid under a Regulatory Enforcement Agreement.

### **Head 36: High Court may make Regulatory Enforcement Agreement order and ancillary orders**

Provide for:

- (a) Without prejudice to *Head 29(b)*, the High Court may, upon the application of a regulator, make an order in the terms of a Regulatory Enforcement Agreement (in this Head referred to as an REA order) if the Court is satisfied that:
  - (i) the regulated entity or individual consents to the making of the order;
  - (ii) the regulated entity or individual obtained legal advice before so consenting;
  - (iii) the agreement is clear and unambiguous and capable of being complied with,

- (iv) the regulated entity or individual is aware that failure to comply with any order so made would constitute contempt of court;
  - (v) the regulator has, not later than 14 days before the making of the application, complied with the requirements in *Head 30* that the details of the Regulatory Enforcement Agreement are to be publicised; and
  - (vi) the terms of the Regulatory Enforcement Agreement are proportionate in relation to the contravention involved and are in the interests of justice.
- (b) the High Court may, on the application of any affected third party (that is, other than the regulator or the regulated entity or individual to which an REA order applies), to vary or annul an REA order if the Court is satisfied that the REA in respect of which the REA order was made requires the regulated entity or individual to which the REA order applies to do or refrain from doing anything that would result in a breach of any contract between, on the one part, the regulated entity or individual concerned and, on the other part, the affected third party applicant, or that would otherwise render a term of that contract not capable of being performed;
- (c) the High Court shall not make an order under paragraph (b) if it is satisfied that the contract or term of the contract to which the application for such an REA order relates is in breach of the law or is otherwise a contravention of legislation;
- (d) the High Court shall have jurisdiction, on the application of the regulator or a regulated entity or individual to which an REA order applies, to vary or annul the REA order if:
  - (i) the party (other than the applicant for the order) to the Regulatory Enforcement Agreement to which the REA order applies consents to the application,
  - (ii) the REA order contains a material error,
  - (iii) there has been a material change in circumstances since the making of the REA order that warrants the Court varying or annulling the order, or
  - (iv) the Court is satisfied that, in the interests of justice, the REA order should be varied or annulled.
- (e) an REA order of the High Court shall cease to have effect 7 years after the making of the latest order of the Court in relation to the REA Order;
- (f) Notwithstanding anything in this Head, the High Court may, on the application of the relevant regulator not earlier than 3 months before the expiration of an REA order, make an order extending the period of the REA order (whether or not previously extended) for a further period not exceeding 3 years.

**Explanatory note.** This implements recommendations R 4.30 to 4.35 as to the jurisdiction that the High Court may exercise, on application to it, in respect of Regulatory Enforcement Agreements. It is important to note that, as provided for in *Head 29(b)*, since a Regulatory Enforcement Agreement is a voluntary agreement, it is not necessary that it be confirmed by the High Court for it to come into operation. *Head 36(a)* nonetheless provides for circumstances in which

a regulator may choose to convert a Regulatory Enforcement Agreement into a court order. The later paragraphs provide for those circumstances in which it may be necessary to apply to court to have a Regulatory Enforcement Agreement varied or annulled.

## **Part 4 Deferred Prosecution Agreements**

### **Head 37: Deferred Prosecution Agreements: general requirements**

Provide for:

A procedure for Deferred Prosecution Agreements (in this Part referred to as the DPA system) shall be established under this Part, which shall be subject to the following general requirements:

- (a) the DPA system shall be operated exclusively by the Director of Public Prosecutions,
- (b) the Director of Public Prosecutions alone may bring the terms of a proposed Deferred Prosecution Agreement (in this Part referred to as a DPA) to the High Court for consideration; and
- (c) a DPA shall come into effect only when approved by the High Court in accordance with this Part.

**Explanatory note.** This implements recommendations R 5.01 and R 5.02. Recommendation 5.01 is that a system for Deferred Prosecution Agreements (DPAs) should be introduced which, to ensure that it is consistent with constitutional requirements, must be (a) on a statutory basis, (b) subject to judicial oversight, (c) subject to guiding principles and (d) contain sufficient procedural safeguards. Recommendation 5.02 is that the statutory scheme of DPAs should be operated under the control of the Director of Public Prosecutions (DPP), that the DPP would bring the terms of a DPA to the High Court and that a DPA would come into effect only when approved by the Court.

### **Head 38: Deferred Prosecution Agreements: criteria for approval**

Provide for:

The High Court shall carry out a review of each term of the DPA, and the DPA in its entirety, and before the DPA can be approved the Court shall determine that the terms individually, or when taken as a whole, satisfy the following two part test at both a preliminary and final hearing:

- (a) that the DPA as a whole and its individual terms are fair, reasonable and proportionate; and
- (b) that approval of the DPA is in the interests of justice.

**Explanatory note.** This implements recommendation R 5.03, that the High Court shall carry out a review of each term of the DPA, and the DPA in its entirety, and before the DPA can be approved the Court must determine that the terms



individually, or when taken as a whole, satisfy the following two part test at both a preliminary and final hearing: (a) that the DPA as a whole and its individual terms are fair, reasonable and proportionate; and (b) that approval of the DPA is in the interests of justice. This two part process, and the two part criteria, are modelled on the statutory DPA scheme enacted in the United Kingdom, which the Report considers is a suitable model on which to base a DPA system in Ireland.

### **Head 39: Scope of Deferred Prosecution Agreements: corporate bodies and prescribed indictable offences**

Provide for:

- (a) A DPA shall be applicable to corporate bodies (and other unincorporated undertakings such as partnerships) only, and not to natural persons;
- (b) a DPA shall be applicable only in relation to the offences specified in paragraph (c), and in respect of which the offending is of sufficient seriousness to warrant a prosecution on indictment;
- (c) the offences to which paragraph (b) refers are:
  - (i) The common law offence of conspiracy to defraud;
  - (ii) The common law offences of bribery and conspiracy to make corrupt payments;
  - (iii) Offences under the Criminal Justice (Theft and Fraud Offences) Act 2001;
  - (iv) Offences under the Competition Act 2002;
  - (v) Offences under the Companies Act 2014;
  - (vi) Offences under the Criminal Justice Act 2011;
  - (vii) Offences under the Value-Added Tax Act 1972, the Taxes Consolidations Act 1997, the Stamp Duties Consolidation Act 1999 or the Capital Acquisitions Tax Consolidation Act 2003;
  - (viii) Offences under the European Union (Market Abuse) Regulations 2016 (S.I. No.349 of 2016); and
  - (ix) Offences under the Criminal Justice (Corruption Offences) Act 2018.
- (d) The offences in paragraph (c) shall be reviewed from time to time by the Oireachtas.

**Explanatory note.** Paragraph (a) implements recommendation R 5.04, that DPAs should only be applicable to corporate bodies (and other unincorporated undertakings such as partnerships) but not to natural persons. Paragraph (b) implements recommendation R 5.05, that the DPA scheme should only be available in cases concerning specified offences, in which the offending is of sufficient seriousness to warrant a prosecution on indictment. Recommendation R 5.05 also includes an indicative list of offences to which DPAs should apply: (1) the common law offence of conspiracy to defraud; (2) the common law offences of bribery and conspiracy to make corrupt payments; (3) offences under the Criminal Justice (Theft and Fraud Offences) Act 2001; (4) offences under the Competition Act 2002; (5) offences under the Companies Act 2014; (6) Offences under the Criminal Justice Act 2011; (7) offences under the Taxes Consolidations Act

1997, the Stamp Duties Consolidation Act 1999, the Capital Acquisitions Tax Consolidation Act 2003, and the Value-Added Tax Act 1972; (8) offences under the European Union (Market Abuse) Regulations 2016 (S.I. No.349 of 2016); and (9) offences under the Criminal Justice (Corruption Offences) Act 2018.

Recommendation R 5.05 also provides that this list of offences should be reviewed from time to time by the Oireachtas.

#### **Head 40: Code of Practice on Deferred Prosecution Agreements**

Provide for:

The Director of Public Prosecutions shall produce and publish a Code of Practice, which shall set out the detailed substantive and procedural elements of the DPA scheme, including:

- (a) the role of the Director,
- (b) the standards the Director will apply in the process of negotiating and preliminarily agreeing a Deferred Prosecution Agreement and
- (c) the relationship between the Director and any relevant regulator.

**Explanatory note.** This implements recommendation R 5.06, that the Director of Public Prosecutions will produce and publish a Code of Practice (comparable to the DPP's Guidance for the Cartel Immunity Programme), which will set out the detailed substantive and procedural elements of the DPA scheme, including the role of the DPP, the standards the DPP will apply in the process of negotiating and preliminarily agreeing a DPA and the relationship between the DPP and any relevant regulator in this context.

#### **Head 41: Invitation to negotiate Deferred Prosecution Agreement**

Provide for:

The decision to invite a corporate body to negotiate a DPA shall be exclusively a matter of the exercise of discretion by the Director of Public Prosecutions, the Director having regard where relevant on a case made to the Director by any relevant regulator.

**Explanatory note.** This implements recommendation R 5.07, that the decision to invite a corporate body to negotiate a DPA will be a matter for the DPP's discretion based on a case made to the DPP by any relevant regulator.

#### **Head 42: Confidentiality of Deferred Prosecution Agreement negotiations**

Provide for:

DPA negotiations shall take place between the DPP and the corporate body otherwise than in public, and the fact of the negotiations shall remain confidential during the negotiations.

**Explanatory note.** This implements recommendation R 5.08, that the DPA negotiations that take place between the DPP and the corporate body shall take place otherwise than in public, and the fact of the negotiations shall remain confidential during the negotiations.

#### **Head 43: Initial and final application to High Court for Deferred Prosecution Agreement**

Provide for:

- (a) where the DPP has determined that a DPA is likely to be the appropriate outcome for a specific case, the DPP shall make an initial application to the High Court for preliminary approval of the DPA, and the matter may not proceed further unless the Court considers that the application meets the criteria set out in *Head 38*;
- (b) notwithstanding the High Court has given indicative approval in the preliminary hearing, the DPA shall come into effect only where the Court approves of a DPA in a final approval hearing.

**Explanatory note.** Paragraph (a) implements recommendation R 5.09, that the DPP shall, where the DPP has determined that a DPA is likely to be the appropriate outcome for a specific case, make an initial application to the High Court for preliminary approval of the DPA, and that the matter may not proceed further unless the Court considers that the application meets the criteria set out in *Head 38*, above. Paragraph (b) implements recommendation R 5.10, that, notwithstanding the High Court's indicative approval in the preliminary hearing, the DPA can only come into effect where the Court approves of a DPA in a final approval hearing.

#### **Head 44: Saver for legal professional privilege**

Provide for:

Nothing in this Act, or in any guidance or Code of Practice, shall alter or affect the right of the corporate body (or other undertaking) in relation to asserting legal professional privilege.

**Explanatory note.** This implements recommendation R 5.11, that the statutory framework for DPAs should expressly provide that nothing in the legislation, or in any guidance or Code of Practice, shall alter or affect the corporate body's rights in relation to asserting legal professional privilege.

#### **Head 45: Initial DPA hearing otherwise than in public and final DPA hearing in public**

Provide for:

- (a) the initial DPA hearing for preliminary approval by the High Court shall be held otherwise than in public;
- (b) the final DPA hearing for approval by the High Court shall be held in public;

**Explanatory note.** Paragraph (a) implements recommendation R 5.12, that the preliminary DPA approval hearing by the High Court shall be held otherwise than in public. Paragraph (b) implements recommendation R 5.13, that the final DPA approval hearing by the High Court shall be held in public.

#### **Head 46: Publication of details of Deferred Prosecution Agreement**

Provide for:

- (a) Each DPA approved by the High Court shall be published in full on the website of the Director of Public Prosecutions;
- (b) Without prejudice to any other terms that the Court shall approve, the following mandatory terms shall be included in each approved DPA:
  - (i) A statement of facts outlining the full extent, nature, and circumstances of the corporate body's offending,
  - (ii) A time period after which the DPA will expire,
  - (iii) A financial penalty.

**Explanatory note.** Paragraph (a) implements recommendation R 5.14, that DPAs approved by the High Court shall be published in full on the DPP's website. Paragraph (b) implements recommendation R 5.15 that, without prejudice to any other terms that the Court shall approve, the following mandatory terms shall be included in each approved DPA: (a) a statement of facts outlining the full extent, nature, and circumstances of the corporate body's offending; (b) a time period after which the agreement will expire; and (c) a financial penalty.

#### **Head 47: Variation of Deferred Prosecution Agreement**

Provide for:

The terms of the DPA may be varied by order by the High Court, or as agreed between the parties and with the approval of the High Court.

**Explanatory note.** This implements recommendation R 5.16, that the terms of the DPA may be varied by order by the High Court, or as agreed between the parties and with the approval of the High Court.

#### **Head 48: Breach of terms of Deferred Prosecution Agreement**

Provide for:

- (a) On the application of the DPP, the High Court shall consider a suspected breach of the terms of the DPA, and shall consider and determine whether the breach is either:
  - (i) a minor breach, that is, a breach that does not amount to a serious or material breach, or
  - (ii) a serious or material breach;
- (b) Where the High Court determines that there has been a serious or material breach of the DPA, the Court shall order the termination of the DPA;
- (c) in all cases where the High Court has determined that there has been a breach of the DPA, the DPP shall publish details of each breach.

**Explanatory note.** Paragraph (a) implements recommendation R 5.17, that the High Court shall have jurisdiction to consider, on the application of the DPP, a suspected breach of the terms of the DPA, and this should provide for different treatment of the breach depending on whether the breach is (a) a minor breach, that is, a breach that does not amount to a serious or material breach; and (b) a serious or material breach. Paragraph (b) implements recommendation R 5.18, that where the High Court determines that there has been a serious or material breach of the DPA, the Court shall order the termination of the DPA. Paragraph (c) implements recommendation R 5.19, that in the case of all breaches of the DPA as determined by the High Court, the DPP shall publish details of each breach.

#### **Head 49: Notice of expiry of Deferred Prosecution Agreement**

Provide for:

Upon the expiry of the DPA's period of deferral, if there is no ongoing breach application in process, the DPP shall give notice to the High Court that the DPA has concluded.

**Explanatory note.** This implements recommendation R 5.20, that upon the expiry of the DPA's period of deferral, if there is no ongoing breach application in process, the DPP shall give notice to the High Court that the DPA has concluded.

#### **Head 50: Effect of Deferred Prosecution Agreement in criminal and civil proceedings**

Provide for:

- (a) in any criminal proceedings brought against the corporate body which are either:
  - (i) A resumption of the previously suspended indictment, following the termination of a DPA for a serious or material breach; or
  - (ii) Further criminal proceedings freshly instituted against the corporate body,

the statement of facts included in the DPA may be relied upon by the prosecution in evidence, as an admission by the corporate body of its contents, as they relate to that body;

- (b) in civil proceedings brought against the corporate body, by any party, the statement of facts appearing in an approved DPA may be relied upon by that party as an express admission by the corporate body of the content of the statement.

**Explanatory note.** Paragraph (a) implements recommendation R 5.21, that in any criminal proceedings brought against the corporate body which are either: (i) a resumption of the previously suspended indictment, following the termination of a DPA for a serious or material breach, or (ii) further criminal proceedings freshly instituted against the corporate body, the statement of facts included in the DPA may be relied upon by the prosecution in evidence, as an admission by the corporate body of its contents, as they relate to that body. Paragraph (b) implements recommendation R 5.22, that in civil proceedings brought against the corporate body, by any party, the statement of facts appearing in an approved DPA may be relied upon by that party as an express admission by the corporate body of the content of the statement.

## Part 5 Coordination between Regulators

### Head 51: Coordination between Regulators: general

Provide for:

- (a) Where the jurisdiction of different regulators overlaps, the regulators concerned shall implement a Framework Agreement or Memorandum of Understanding to facilitate the coordination of standard setting, monitoring and enforcement activities between the regulators;
- (b) Network-based voluntary arrangements to achieve coordination between regulators should be preferred to top-down hierarchical approaches.

**Explanatory note.** Paragraph (a) implements recommendation R 6.01, that where the jurisdiction of different regulators overlaps, the regulators concerned should implement a Framework Agreement or Memorandum of Understanding to facilitate the coordination of standard setting, monitoring and enforcement activities between regulators. This has been included in this Draft Scheme, but it should be noted that recommendation R 6.01 also provides that such arrangements may but need not necessarily be in statutory form. Paragraph (b) implements recommendation R 6.14 that, in the interests of regulatory

independence, network-based voluntary arrangements to achieve coordination between regulators should be preferred to top-down hierarchical approaches.

#### **Head 52: Sharing of information between Regulators**

Provide for:

- (a) Where regulators operate within the same sector, appropriate mechanisms, taking account of relevant statutory requirements including as to data protection, should be implemented to ensure the sharing of information and expertise between regulators;
- (b) Regulators with overlapping jurisdiction but without formal cooperation agreements shall avail of information sharing, where appropriate, and to the extent permitted by relevant legislation, including as to data protection;
- (c) The circumstances and purposes for which specified regulators may share certain information with other specified regulators shall, where appropriate, be prescribed and shall have regard to all other relevant legislation including concerning data protection.

**Explanatory note.** Paragraph (a) implements recommendation R 6.02, that where regulators operate within the same sector, appropriate mechanisms, taking account of relevant statutory requirements including as to data protection, should be implemented to ensure the sharing of information and expertise between regulators. Paragraph (b) implements recommendation R 6.13 that regulators with overlapping jurisdiction but without formal cooperation agreements should avail of information sharing, where appropriate, and to the extent permitted by relevant legislation, including as to data protection. Paragraph (c) implements recommendation R 6.16 that legislation should, where appropriate, having regard to all other relevant legislation including concerning data protection, prescribe the circumstances and purposes for which specified regulators may share certain information with other specified regulators.

#### **Head 53: Cooperation and consultation arrangements between Regulators**

Provide for:

- (a) Regulators, when entering into cooperation agreements, shall agree clear objectives for these agreements, taking account of any relevant guidance from the Regulatory Guidance Office provided for in *Head 2*;
- (b) Regulators shall, where appropriate, both as part of cooperation agreements and in general, employ consultation as a coordinating instrument to facilitate the flow of expertise, knowledge and experience between regulators;
- (c) Regulators shall publish guidelines governing the consultation process with other regulators;
- (d) Where possible and appropriate, regulators shall publish the information which they provide to other regulators during a consultation process.

- (e) Guidelines may be published by regulators concerning coordination, without prejudice to the capacity of the regulators to take the appropriate steps to achieve the desired coordination;
- (f) Where any instruments are employed to achieve coordination between regulators, the regulators shall retain a clear record of the scope of coordination and the relative functions or responsibilities of each regulator.

**Explanatory note.** This implements recommendations R 6.03, R 6.06 to R 6.08, R 6.15 and R 6.17 concerning cooperation and consultation mechanisms between Regulators. Paragraph (a) provides that regulators, when entering into cooperation agreements, shall agree clear objectives for these agreements, taking account of any relevant guidance from the Regulatory Guidance Office provided for in *Head 2* of the Draft Scheme. Paragraph (b) provides that regulators shall, where appropriate, both as part of cooperation agreements and in general, employ consultation as a coordinating instrument to facilitate the flow of expertise, knowledge and experience between regulators. Paragraph (c) provides that regulators shall publish guidelines governing the consultation process with other regulators. Paragraph (d) provides that, where possible and appropriate, regulators shall publish the information which they provide to other regulators during a consultation process. Paragraph (e) provides that guidelines may be published by regulators concerning coordination, without prejudice to the capacity of the regulators to take the appropriate steps to achieve the desired coordination. Paragraph (f) provides that where any instruments are employed to achieve coordination between regulators, the regulators shall retain a clear record of the scope of coordination and the relative functions or responsibilities of each regulator.

#### **Head 54: Lead agency approach to be agreed where appropriate**

Provide for:

- (a) Regulators should, where appropriate, implement a lead agency approach to the coordination of regulatory activities;
- (b) Where practicable, the lead agency should be determined in accordance with an agreement between the regulators on a case-by-case basis.

**Explanatory note.** Paragraph (a) implements recommendation R 6.09 that regulators should, where appropriate, implement a lead agency approach to the coordination of regulatory activities. Paragraph (b) implements recommendation R 6.10 that, preferably, the lead agency should be determined in accordance with an agreement between the regulators on a case-by-case basis.

#### **Head 55: Joint action to be employed where appropriate**

Provide for:



Where one regulator requires the use of expertise possessed by another regulator to assist in the first-mentioned regulator's monitoring or enforcement activities, joint action shall be employed where appropriate.

**Explanatory note.** This implements recommendation R 6.11, that, where one regulator requires the use of expertise possessed by another regulator to assist in their monitoring or enforcement activities, joint action should be employed where appropriate.

#### **Head 56: Common inspectorates to be employed only where coordination not practicable**

Provide for:

Regulators shall employ common inspectorates only where a particular expertise is required that is not readily shared or pooled between regulators and where coordination between existing regulators would be impracticable.

**Explanatory note.** This implements recommendation R 6.12, that regulators should employ common inspectorates only where a particular expertise is required that is not readily shared or pooled between regulators and where coordination between existing regulators would be impracticable.

### **Part 6 Appeals from Certain Regulatory Decisions**

#### **Head 57: Appeals from Irish Financial Services Appeals Tribunal to High Court**

Provide for:

The appeal to the High Court from a decision of the Irish Financial Services Appeals Tribunal shall be limited to an appeal on a point of law only, and the decision of the High Court on such appeal shall be final, subject to the discretion of the High Court to grant leave to state a case to the Court of Appeal;

**Explanatory note.** In recommendation R 7.01, the Commission recommends that the Irish Financial Services Appeals Tribunal (IFSAT) be retained in its current form. Consequently, this Head implements recommendation R 7.02 that the right of appeal to the High Court from a decision of IFSAT be limited to an appeal on a point of law only, that the decision of the High Court on such appeal should be final, subject to the discretion of the High Court to grant leave to state a case to the Court of Appeal.

#### **Head 58: Appeals from Market-Affecting Decisions of Regulators to High Court Regulatory Appeals List**

Provide for:

- (a) Appeals from market-affecting decisions of specified regulators shall be to the High Court Regulatory Appeals List provided for in *Head 59*;

- (b) Repeal of provisions concerning appeals to appeal panels from market-affecting decisions of the Commission for Aviation Regulation and the Commission for the Regulation of Utilities.

**Explanatory note.** In recommendation R 7.03, the Commission recommends that a standing appeals tribunal to hear appeals from market-affecting decisions of the regulators encompassed by this Report should not be established. Following from this, paragraph (a) implements, in part, recommendation R 7.04 that legislation should be enacted in respect of the regulators encompassed by this Report providing for a right of appeal to the High Court (that is, the High Court Regulatory Appeals List provided for in *Head 59*) from market-affecting decisions of those regulators. As discussed in the Report, while a general definition of market-affecting decisions is not possible, they would include decisions such as the revocation of a licence by a regulator. Paragraph (b) implements the remainder of recommendation R 7.04, that the provisions concerning appeals to appeal panels from market-affecting decisions of the Commission for Aviation Regulation (CAR) and the Commission for the Regulation of Utilities (CRU) should be repealed.

#### **Head 59: High Court Regulatory Appeals List**

Provide for:

- (a) the Rules of the Superior Courts 1986 shall be amended to provide for the establishment of the High Court (Regulatory Appeals List) to hear market-affecting decisions of the regulators encompassed by this Act, which shall include provisions for admission to the list and for its management comparable to those in Order 63A (Commercial Court List) and Order 63B (Competition Court List) of the 1986 Rules;
- (b) there shall be allocated to the establishment of the High Court (Regulatory Appeals List) such additional resources as will allow the List to operate efficiently and effectively and that, subject to the powers of the President of the High Court as to assignment of judges, a panel of judges shall be assigned to the List;
- (c) the determination of the High Court (Regulatory Appeals List) shall be final, subject to the Court in its discretion granting leave to state a case to the Court of Appeal;
- (d) the formula of words used in connection with any specific appeal to the High Court (Regulatory Appeals List) shall (having regard to the requirement that certain appeals from market affecting decisions to the High Court shall, as a matter of law, including EU law, involve a full re-hearing, whereas other appeals may be restricted to an appeal on a point of law) specify:
  - (i) whether the Court is entitled or required either to review the factual determinations made by the regulator and to substitute its own conclusion for that of the regulator (a full re-hearing) or

- (ii) whether the Court is limited to determining the appeal on the basis of points of law.

**Explanatory note.** While *Head 59* involves recommendations concerning amendments to the *Rules of the Superior Courts 1986*, it has been included in the draft Scheme both for completeness and because some paragraphs concern the provision of appropriate resources, which require primary legislation. Paragraph (a) implements recommendation R7.07 that the *Rules of the Superior Courts 1986* be amended to provide for the establishment in the High Court of a Regulatory Appeals List to hear market-affecting decisions of the regulators encompassed by this Report, and which should include provisions for admission to the list and for its management comparable to those in Order 63A (Commercial Court List) and Order 63B (Competition Court List) of the 1986 Rules. Paragraph (b) implements recommendation R 7.05 that there should be allocated to the establishment of the High Court Regulatory Appeals List such additional resources as will allow the List to operate efficiently and effectively and that, subject to the powers of the President of the High Court as to assignment of judges, a panel of judges should be assigned to the List. As noted in the Report, detailed arrangements as to resourcing are outside the role of the Law Reform Commission and require decisions by the Government and Oireachtas. Paragraph (c) implements recommendation R7.06 that the determination of the High Court (Regulatory Appeals List) should be final, subject to the High Court granting leave to state a case to the Court of Appeal. Paragraph (d) implements recommendation R.7.07 that, bearing in mind that some appeals from market affecting decisions to the High Court must, as a matter of law (including EU law), involve a full re-hearing whereas other appeals could be restricted to an appeal on a point of law, it should be made clear in the formula of words used whether the Court is entitled or required to review the factual determinations made by the regulator and to substitute its own conclusion for that of the regulator (a full re-hearing) or whether the Court is limited to determining the appeal on the basis of points of law.

### **3. Draft Scheme of Corporate Criminal Liability Bill**

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## Draft Scheme of Corporate Criminal Liability Bill

### DRAFT SCHEME OF BILL

entitled

An Act to provide for a scheme of criminal liability of corporate bodies and prescribed undertakings,<sup>2</sup> to provide for the criminal liability of senior managerial agents, and to provide for related matters.<sup>3</sup>

### Part 1 Corporate criminal liability and subjective fault offences

#### Head 1: Scope of Part 1: subjective fault offences

Provide for:

This Part applies to subjective fault based offences, that is, those that involve proof of knowledge, intention, or recklessness.

**Explanatory note.** This implements, in part, recommendation R 8.02, that the scheme of corporate criminal liability will provide for different models to attribute liability for the following 3 types of offences: subjective fault based offences (those that involve proof of knowledge, intention, or recklessness); objective fault based offences (those that involve proof of gross negligence, negligence, unreasonableness or comparable terms); and no fault offences (that is, strict liability offences, in which a defence of due diligence is available, and absolute liability offences, in which a defence of due diligence is not available).

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<sup>2</sup> As noted in the Report, the Commission has used the term “corporate body” to refer to the general scope of its proposals, while recognising that many statutory schemes, such as the *Competition Act 2002* and the *Safety, Health and Welfare at Work Act 2005*, also apply to a wider category of commercial, though unincorporated, undertakings such as partnerships. The recommendations in the Report, and the Heads in this Draft Scheme, also therefore refer to their application to “other prescribed undertakings”, the precise definition of which would remain to be considered and determined in any enacted legislation.

<sup>3</sup> The Commission is conscious that, in 2010, the Criminal Law Codification Advisory Committee published a Draft *Criminal Code Bill*, available at [www.criminalcode.ie](http://www.criminalcode.ie), and that the proposals in this Draft Scheme could be enacted either as a standalone Bill or as a component of the General Part (the general principles of criminal liability) of a *Criminal Code Bill*. See to the same effect the draft Bills in the Commission’s *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), *Report on Defences in Criminal Law* (LRC 95-2009) and *Report on Inchoate Offences* (LRC 99-2010).

## **Head 2: Attribution of corporate criminal liability for subjective fault offences identified through corporate agents exercising policy-related operational authority**

Provide for:

- (a) the subjective fault element of an offence that is to be attributed to the corporate body:
  - (i) may be identified in a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the offence in question, and
  - (ii) that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question, but
  - (iii) not including a natural person who has only been given the role of carrying out such policy-related operational authority;
- (b) in order for the subjective fault of the identified employee or agent to be attributed to the corporate body, the employee or agent must have acted (whether in committing the conduct element of the offence, delegating that conduct element to another employee or agent, or acquiescing to that conduct element within the meaning of paragraph (c)), at least in part for the benefit of the corporate body or within the scope of his or her activity for the corporate body;
- (c) the subjective fault element of an offence shall be attributed to the corporate body in the following circumstances:
  - (i) where the identified employee or agent, operating within the scope of his or her authority, is party to an offence; or
  - (ii) where the identified employee or agent, operating within the scope of his or her authority, delegated the conduct element of the offence to one or more other employees or agents of the corporate body; or
  - (iii) where the identified employee or agent knowingly fails to take reasonable steps to prevent the conduct element of an offence being perpetrated by one or more other employees or agents of the corporate body (whether or not he or she is operating within the scope of his or her authority); or
  - (iv) where the identified employee or agent, operating within the scope of his or her authority, recklessly (with a conscious disregard of risk) fails to take reasonable steps to prevent criminal conduct being perpetrated by one or more other employees or agents of the corporate body.

**Explanatory note.** This implements recommendations R 8.03 to R 8.06 concerning the general principles of attribution in subjective fault offences. Recommendation R 8.03 provides that this should include an attribution model for subjective fault based offences based on a significantly expanded and reformed model of the identification doctrine.

Paragraph (a) implements recommendation R 8.04 and provides that the subjective fault element of an offence, which is to be attributed to the corporate body, may be identified in a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the offence in question, and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question, but not including a natural person who has simply been given the role of carrying out such policy-related operational authority.

Paragraph (b) implements recommendation R 8.05 and provides that in order for the subjective fault of the identified employee or agent to be attributed to the corporate body, the employee or agent must have acted (whether in committing the conduct element of the offence, delegating that conduct element to another employee or agent, or acquiescing to that conduct element: see recommendation 8.06 below), at least in part, “for the benefit of the corporate body” or “within the scope of his or her activity for the corporate body”.

Paragraph (c) implements recommendation R 8.06 and provides that the subjective fault element of an offence will be attributed to the corporate body in the following circumstances: (1) where the identified employee or agent, operating within the scope of his or her authority, is party to an offence; or (2) where the identified employee or agent, operating within the scope of his or her authority, delegated the conduct element of the offence to one or more other employees or agents of the corporate body; or (3) where the identified employee or agent knowingly fails to take reasonable steps to prevent the conduct element of an offence being perpetrated by one or more other employees or agents of the corporate body (whether or not he or she is operating within the scope of his or her authority); or (4) where the identified employee or agent, operating within the scope of his or her authority, recklessly (with a conscious disregard of risk) fails to take reasonable steps to prevent criminal conduct being perpetrated by one or more other employees or agents of the corporate body.

### **Head 3: Rebuttable presumption concerning corporate agents exercising policy-related operational authority**

Provide for:

- (a) a rebuttable presumption shall apply to the effect that an identified employee or agent, acting within the scope of his or her authority, is party to an offence (the first ground for liability set out in *Head 2(c)*);
- (b) this presumption shall be raised where the prosecution has demonstrated (to the satisfaction of the evidential standard) that:
  - (i) the conduct element of the offence has occurred, and



- (ii) this conduct could only have been committed in satisfaction of one of the 4 grounds in *Head 2(c)*, and
- (iii) in raising this presumption, the prosecution shall not be required to identify a specific employee or agent exercising a delegated operational authority;
- (c) the corporate body defendant shall rebut this presumption by demonstrating (to the satisfaction of the evidential burden) either that:
  - (i) no specific employee or agent, exercising a delegated operational authority, in fact satisfied any of the 4 grounds outlined in *Head 2(c)*, or
  - (ii) the corporate body had taken all reasonable steps to prevent the satisfaction of whichever of the 4 grounds is being relied upon by the prosecution.

**Explanatory note.** This implements recommendations R 8.07 to R 8.09 as to a rebuttable presumption concerning corporate agents exercising policy-related operational authority.

Paragraph (a) implements recommendation R 8.07 and provides that a rebuttable presumption shall apply to the effect that an identified employee or agent, acting within the scope of his or her authority, is party to an offence (the first ground for liability set out in *Head 2(c)*), which the Commission considers is supported on the basis (as has been held in relevant case law) that these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents.

Paragraph (b) implements recommendation R 8.08 and provides that this presumption will be raised where the prosecution has demonstrated (to the satisfaction of the evidential standard) that: (1) the conduct element of the offence has occurred, and (2) this conduct could only have been committed in satisfaction of one of the 4 grounds outlined in *Head 2(c)*, and that (3) in raising this presumption, the prosecution will not be required to identify a specific employee or agent exercising a delegated operational authority.

Paragraph (c) implements recommendation R 8.09 and provides that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) either that: (1) no specific employee or agent, exercising a delegated operational authority, in fact satisfied any of the 4 grounds outlined in *Head 2(c)*; or (2) the corporate body had taken all reasonable steps to prevent the satisfaction of whichever of the 4 grounds is being relied upon by the prosecution.

## Part 2 Corporate criminal liability and objective fault offences

### Head 4: Scope of Part 2: objective fault offences

Provide for:

This Part applies to objective fault based offences, that is, those that involve proof of (a) gross negligence or (b) negligence, unreasonableness or comparable terms (referred to in this Part as “simple negligence offences”).

**Explanatory note.** This implements, in part, recommendation R 8.02, that the scheme of corporate criminal liability will provide for different models to attribute liability for the following 3 types of offences: subjective fault based offences (those that involve proof of knowledge, intention, or recklessness); objective fault based offences (those that involve proof of gross negligence, negligence, unreasonableness or comparable terms); and no fault offences (that is, strict liability offences, in which a defence of due diligence is available, and absolute liability offences, in which a defence of due diligence is not available).

#### **Head 5: Attribution of corporate criminal liability for gross negligence offences**

Provide for:

The attribution of corporate criminal liability for gross negligence offences shall involve the following elements:

- (a) The corporate body was negligent;
- (b) The negligence of the corporate body was of a sufficiently high degree to be characterised as gross negligence, that is, it fell far below the standard of care required in the circumstances; and
- (c) The negligence resulted in the conduct (consequence) element of the offence in question being satisfied.

**Explanatory note.** This implements recommendation R 8.11 that the attribution of corporate criminal liability for gross negligence offences should involve the following elements: (1) the corporate body was negligent; (2) The corporate body’s negligence was of a sufficiently high degree to be characterised as “gross” negligence, that is, it fell far below the standard of care required in the circumstances; and (3) the negligence resulted in the conduct (consequence) element of the offence in question being satisfied.

#### **Head 6: Attribution of corporate criminal liability for simple negligence offences**

Provide for:

The attribution of corporate criminal liability for simple negligence offences shall involve the following elements:

- (a) The corporate body was negligent; and
- (b) The negligence resulted in the conduct (consequence) element of the offence in question being satisfied.

**Explanatory note.** This implements recommendation R 8.12 that the attribution of corporate criminal liability for simple negligence offences should involve the following elements: (1) the corporate body was negligent; and (2) the negligence

resulted in the conduct (consequence) element of the offence in question being satisfied.

**Head 7: Regard to be had to how activities are managed or organised in assessing whether standard of care breached**

Provide for:

- (a) In assessing whether a corporate body has breached the standard of care in either type of objective fault offence referred to in *Head 4*, regard shall be had to the way in which the organisation’s activities are managed or organised by employees or agents coming within *Head 2*, including by reference to the non-exhaustive list of matters in paragraph (b);
- (b) The matters referred to in paragraph (b) are:
  - (i) internal governance and communications systems,
  - (ii) the role of employees or agents coming within *Head 2*,
  - (iii) compliance (or otherwise) with relevant statutory requirements, and
  - (iv) compliance (or otherwise) with relevant statutory codes or guidance from regulators.

**Explanatory note.** This implements recommendation R 8.13 that, in both types of objective fault offences referred to in *Head 4* (gross negligence and simple negligence), when assessing whether a corporate body has breached the standard of care, regard should be had to the way in which the organisation’s activities are managed or organised by high managerial agents (the persons identified in *Head 2*); and that this should be done by reference to a non-exhaustive list of “corporate culture” factors, such as internal governance and communications systems, the role of the persons identified in *Head 2*, compliance (or otherwise) with relevant statutory requirements, and compliance (or otherwise) with relevant statutory codes or guidance from regulators.

**Head 8: Determining the appropriate level of culpability (tracking)**

Provide for:

- (a) Where objective fault based offences do not use either gross negligence or simple negligence as the fault element, the most suitable objective fault attribution should be applied, in accordance with paragraph (b);
- (b) in the case of offences in which the level of culpability required of the fault element is lower than or equal to that of simple negligence, the simple negligence model shall apply, and in the case of offences in which the level of culpability required of the fault element is greater than that of simple negligence, the gross negligence model shall apply.

**Explanatory note.** Paragraph (a) implements recommendations R 8.14, that where objective fault based offences do not use either gross negligence or simple negligence as the fault element, the most suitable objective fault attribution

should be applied (which can be described as tracking). Paragraph (b) implements recommendations R 8.15, that in the case of offences in which the level of culpability required of the fault element is lower than or equal to that of simple negligence, the simple negligence model shall apply, and in the case of offences in which the level of culpability required of the fault element is greater than that of simple negligence, the gross negligence model shall apply.

### **Part 3 Corporate criminal liability and no-fault (strict and absolute liability) offences**

#### **Head 9: Scope of Part 3: no-fault (strict and absolute liability) offences**

Provide for:

This Part applies to no fault offences, that is (a) strict liability offences, in which a defence of due diligence is available, and (b) absolute liability offences, in which a defence of due diligence is not available.

**Explanatory note.** This implements, in part, recommendation R 8.02, that the scheme of corporate criminal liability will provide for different models to attribute liability for the following 3 types of offences: subjective fault based offences (those that involve proof of knowledge, intention, or recklessness); objective fault based offences (those that involve proof of gross negligence, negligence, unreasonableness or comparable terms); and no fault offences (that is, strict liability offences, in which a defence of due diligence is available, and absolute liability offences, in which a defence of due diligence is not available).

#### **Head 10: Attribution of corporate criminal liability for no-fault (strict and absolute liability) offences**

Provide for:

- (a) in the case of no-fault (strict liability and absolute liability) offences, attribution of corporate criminal liability shall involve the imposition of direct, personal, criminal liability on a corporate body defendant;
- (b) the conduct element for no-fault (strict liability and absolute liability) offences shall be attributed to the corporate body using the attribution of conduct provisions in *Part 4*;
- (c) where the defence to a strict liability offence requires proof of certain steps or conduct on the part of the corporate body, these steps can be attributed in the same manner as set out in *Head 12*.

**Explanatory note.** Paragraph (a) implements recommendation R 8.16, that in the case of strict and absolute liability offences, the attribution of corporate criminal liability involves the imposition of direct, personal, criminal liability on a corporate body defendant. Paragraph (b) implements recommendation R 8.17, that the

conduct element of both strict and absolute liability offences will be attributed to the corporate body using the attribution of conduct elements in *Part 4* of the Bill, below. Paragraph (c) implements recommendation R 8.18, that where the defence to a strict liability offence requires proof of certain steps or conduct on the part of the corporate body, these steps can be attributed in the same manner as set out in *Head 12*, below.

#### **Part 4 Corporate criminal liability and attribution of conduct elements of offences**

##### **Head 11: Scope of Part 4: attribution of conduct to corporate body**

Provide for:

This Part provides for the attribution to a corporate body of positive conduct, which of itself satisfies the conduct element of an offence (in an act based offence), or which causatively results in the satisfaction of the conduct element of an offence (in a result based offence).

**Explanatory note.** This implements recommendation R 8.19, to provide for the attribution to a corporate body of positive conduct, which of itself satisfies the conduct element of an offence (in an act based offence), or which causatively results in the satisfaction of the conduct element of an offence (in a result based offence).

##### **Head 12: Attribution of conduct to corporate body by certain employees or agents**

Provide for:

The corporate body may have attributed to it the positive criminal acts, or positive conduct which causes a criminal result, of one or more of the employees or agents of the corporate body who are:

- (i) acting in the course of their ordinary or reasonably understood business for the body,
- (ii) directed, expressly or implicitly, by another employee or agent who is exercising a delegated operational authority; or
- (iii) acting for the benefit of the corporate body.

**Explanatory note.** This implements recommendation R 8.20, that the corporate body may have attributed to it the positive criminal acts, or positive conduct which causes a criminal result, of one or more of the corporate body's employees or agents who are: (1) acting in the course of their ordinary or reasonably understood business for the body, (2) directed, expressly or implicitly, by another employee or agent who is exercising a delegated operational authority; or (3) acting for the benefit of the corporate body.

**Head 13: Rebuttable presumption as to attribution of conduct to corporate body**

Provide for:

- (a) A rebuttable presumption that the conduct element of the offence has been satisfied shall be raised where the prosecution has demonstrated (to the satisfaction of the evidential standard) that:
  - (i) the positive criminal act or criminal result, which amounts to the conduct element of the offence in question, has occurred, and
  - (ii) the nature of that act or result is such that the conduct in question was committed by one or more employees or agents of the corporate body (in the case of a criminal act), or it was caused by the conduct of one or more employees or agents of the corporate body (in the case of a criminal result), and
  - (iii) in raising this presumption, the prosecution shall not be required to identify the specific employee or agent who perpetrated the conduct in question.
- (b) The corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) that:
  - (i) the positive criminal act or conduct which caused a criminal result, which amounts to conduct element of the offence in question, was not committed by an employee or agent of the corporate body, or
  - (ii) the corporate body had taken all reasonable steps to prevent commission of the conduct in question.

**Explanatory note.** Paragraph (a) implements recommendation R 8.21, that a rebuttable presumption that the conduct element of the offence has been satisfied shall apply, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents. It provides that this presumption will be raised once the prosecution has demonstrated (to the satisfaction of the evidential standard) that: (i) the positive criminal act or criminal result, which amounts to the conduct element of the offence in question, has occurred, and (ii) the nature of that act or result is such that the conduct in question was committed by one or more employees or agents of the corporate body (in the case of a criminal act), or it was caused by the conduct of one or more employees or agents of the corporate body (in the case of a criminal result; and (iii) in raising this presumption, the prosecution will not be required to identify the specific employee or agent who perpetrated the conduct in question. Paragraph (b) implements recommendation R 8.22 that the corporate body defendant shall be able to rebut this presumption by demonstrating (to the satisfaction of the evidential burden) that: (1) the positive criminal act or conduct which caused a criminal result, which amounts to conduct element of the offence in question, was not committed by an employee or agent of the corporate body; or (2) the corporate body had taken all reasonable steps to prevent commission of the conduct in question.

**Head 14: Conduct by omission to be attributed to corporate body**

Provide for:

Conduct by way of an omission shall be attributed to the corporate body in the same way as it is to a natural person.

**Explanatory note.** This implements recommendation R 8.23, that conduct by way of an omission is to be attributed to the corporate body in the same way as it is to a natural person.

**Part 5 Liability of Corporate Managerial Agents****Head 15: Definition of managerial agent**

Provide for:

“managerial agent” means:

- (a) a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the corporate body,
- (b) and who has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question,
- (c) but not including a natural person who has only been given the role of carrying out such policy-related operational authority.

**Explanatory note.** This implements recommendation R 9.02 that a “managerial agent” should be defined as a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the corporate body; and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question; but not including a natural person who has simply been given the role of carrying out such policy-related operational authority. This mirrors the definition in *Head 2(a)* of the Bill.

**Head 16: Culpable contribution of managerial agent and accompanying fault elements**

Provide for:

Subject to Head 17 (tracking), derivative liability arises for the culpable contribution of a managerial agent to the offence of the corporate body where this is accompanied by one of the following fault elements:

- (a) intention or knowledge;
- (b) subjective recklessness or wilful blindness;
- (c) gross negligence; or
- (d) simple negligence or constructive knowledge.

**Explanatory note.** This implements recommendation R 9.05 that (subject to *Head 17* on the tracking requirement) derivative liability is to be imposed on a managerial agent where his or her culpable contribution to corporate offending is accompanied by one of the following fault elements: (1) intention or knowledge; (2) subjective recklessness or wilful blindness; (3) gross negligence; or (4) simple negligence or constructive knowledge. It also implements, in part, recommendation R 9.03, that the derivative scheme of liability, should provide that derivative liability may be imposed upon a managerial agent where that agent's culpability falls within the range of culpability of either subjective fault or objective fault (subject to *Head 17* on the tracking requirement and *Head 18* on strict liability and no fault liability offences). It also implements, in part, recommendation R 9.04, that the derivative scheme of liability should be formulated so as to provide for separate fault and conduct elements.

#### **Head 17 Fault level of managerial agent to reflect fault of principal offender (tracking)**

Provide for:

- (a) The level of fault required of a managerial agent in a specific case in order to impose derivative liability should reflect (track) the level of fault which would be required of a principal offender in a prosecution for the substantive offence;
- (b) where the fault requirement of the substantive offence is not identical to one of those listed in *Head 16*, the level of fault which must be proved of the managerial agent should be the nearest equivalent that involves at the least a comparable level of culpability.

**Explanatory note.** Paragraph (a) implements recommendation R 9.06, that the levels of fault required of a managerial agent in a specific case under the derivative scheme should track the level of fault which would be required of a principal offender in a prosecution for the substantive offence. Paragraph (b) implements recommendation R 9.07, that where the fault requirement of the substantive offence is not identical to one of those listed in *Head 16*, the level of fault which must be proved of the managerial agent should be the nearest equivalent that involves at the least a comparable level of culpability. This *Head* also implements, in part, recommendation R 9.03, that the derivative scheme of liability, should provide that derivative liability may be imposed upon a managerial agent where that agent's culpability falls within the range of culpability of either subjective fault or objective fault (subject to *Head 17* on the tracking requirement and *Head 18* on strict liability and no fault liability offences). It also implements, in part, recommendation R 9.04, that the derivative scheme of



liability should be formulated so as provide for separate fault and conduct elements.

### **Head 18: Derivative liability of managerial agent for strict liability offence or absolute liability offence**

Provide for:

- (a) subject to paragraph (b), where the substantive offence is a strict liability offence or an absolute liability offence, no proof of culpability will be required of a managerial agent in order to impose derivative liability (although the commission of the substantive offence, and the contributory conduct of the managerial agent must be proved),
- (b) where the substantive offence is a strict liability offence or an absolute liability offence, it shall be a defence for the managerial agent to establish (to the evidential burden) that:
  - (i) he or she was not operating with authority or control in relation to the conduct of the corporate body, or its agents, which forms the basis of the conduct element of the substantive offence; or
  - (ii) he or she acted reasonably in relation to the operation of his or her authority or control over the conduct of the corporate body, or its agents, as a managerial agent:
    - (I) in relation to the corporate body's commission of the conduct element of the substantive offence; or
    - (II) in relation to the corporate body's failure to satisfy any defence provided for in relation to substantive offence.

**Explanatory note.** Paragraph (a) implements the first element of recommendation R 9.08 that, where the substantive offence is a strict liability offence or an absolute liability offence, no proof of culpability will be required of a managerial agent in order to impose derivative liability (although the commission of the substantive offence, and the agent's contributory conduct, must still be proved). Paragraph (b) implements the second element of recommendation R 9.08, that an agent will have access to a defence where he or she can establish (to the evidential burden) that: (1) he or she was not operating with authority or control in relation to the conduct of the corporate body, or its agents, which forms the basis of the conduct element of the substantive offence; or (2) he or she acted reasonably in relation to the operation of his or her authority or control over the conduct of the corporate body, or its agents, as a managerial agent: (a) in relation to the corporate body's commission of the conduct element of the substantive offence; or (b) in relation to the corporate body's failure to satisfy any defence provided for in relation to substantive offence.

### **Head 19: Offence by corporate body necessary proof for derivative liability of managerial agent**

Provide for:

- (a) It shall be a necessary proof for the imposition of derivative liability on a managerial agent that the corporate body (or other prescribed undertaking) has committed the substantive offence, but
- (b) It shall not be required that the corporate body (or other prescribed undertaking) was prosecuted or convicted of the substantive offence in order to impose derivative liability on a managerial agent.

**Explanatory note.** Paragraph (a) implements recommendation R 9.09 that the commission of a substantive offence by a corporate body (or other prescribed undertaking) will be a necessary proof for the imposition of derivative liability to a managerial agent, which forms part of the conduct element of the recommended scheme. Paragraph (b) implements recommendation R 9.10, that proof of a prosecution or conviction of a corporate body (or other prescribed undertaking) for a substantive offence will not be required in order to impose derivative liability on a managerial agent.

#### **Head 20: Managerial agent liable as if for substantive offence**

Provide for:

upon proof of the managerial agent's culpable contribution to the substantive offending, he or she shall be guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the substantive offence.

**Explanatory note.** This implements recommendation R 9.11, that upon proof of a managerial agent's culpable contribution to the substantive offending, a managerial agent shall be guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the substantive offence.

#### **Head 21: Proof of culpable contribution by managerial agent**

Provide for:

The culpable contribution managerial agent's to the substantive offending will be proved where the prosecution can demonstrate the following conduct on the part of the managerial agent:

- (a) positive acts of agreement to or approval of the substantive offending;
- (b) tacit agreement or acquiescence to the substantive offending; or
- (c) failing to prevent the substantive offending.

**Explanatory note.** This implements recommendation R 9.12, that a managerial agent's culpable contribution to the substantive offending will be proved where the prosecution can demonstrate the following conduct on the part of the agent: (1) positive acts of agreement to or approval of the substantive offending, (2) tacit

agreement or acquiescence to the substantive offending, or (3) failing to prevent the substantive offending.

## **Head 22: Rebuttable presumption applies to prosecution of managerial agent**

Provide for:

A rebuttable reverse burden provision shall apply and include the following elements:

- (a) The rebuttable presumption shall apply once the prosecution has satisfied a particular proof (to the satisfaction of the evidential burden);
- (b) The presumption shall be that the managerial agent has satisfied both the fault element and the his or her contributory conduct aspect of the conduct element of the offence; and
- (c) The managerial agent shall rebut the presumption where he or she can rebut a particular proof (to the satisfaction of the evidential burden).

**Explanatory note.** This implements recommendation R 9.13 that the derivative scheme of managerial agent liability should include a reverse evidential burden provision, because these offences involve material peculiarly within the knowledge of the corporate body and its managerial agents. It also implements recommendation R 9.14 that the reverse burden provision should include the following elements: (1) a rebuttable presumption will be engaged once the prosecuting entity has satisfied a particular proof (to the satisfaction of the evidential burden); (2) the presumption will be that the managerial agent has satisfied both the fault element and the agent's contributory conduct aspect of the conduct element of the recommended scheme; and (3) the managerial agent shall rebut the presumption where he or she can rebut a particular proof (to the satisfaction of the evidential burden).

## **Head 23: Engaging rebuttable presumption in fault-based offences and in no-fault (strict liability and absolute liability) offences**

Provide for:

- (a) Either
  - (i) where the substantive offence is a fault based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that:
    - (I) the fault requirement of the derivative scheme has been satisfied; and
    - (II) the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence),

or

(ii) where the substantive offence is a strict or absolute liability based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence);

and

(b) the reverse burden provision shall be engaged where the prosecution can prove that the managerial agent in question was, at the material time, a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by the body (or undertaking) whose duties included making decisions that, to a significant extent, could have affected the management of the body (or undertaking), or a person who purported to act in any such capacity.

**Explanatory note.** Paragraph (a)(i) implements recommendation R 9.15 that, where the substantive offence is a fault based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that: (1) the fault requirement of the derivative scheme has been satisfied; and (2) the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence). Paragraph (a)(ii) implements recommendation R 9.16 that, where the substantive offence is a strict or absolute liability based offence, the reverse burden provision, once engaged, will raise a rebuttable presumption that the requirement that the prosecution prove contributory conduct aspect of the conduct element of the derivative scheme has been satisfied (subject to the prosecution still being required to prove the commission of the substantive offence). Paragraph (b) implements recommendation R 9.17, that the reverse burden provision shall be engaged where the prosecution can prove that the managerial agent in question was, at the material time, a director of the corporate body (or other prescribed undertaking) concerned, or a person employed by the body (or undertaking) whose duties included making decisions that, to a significant extent, could have affected the management of the body (or undertaking), or a person who purported to act in any such capacity.

#### **Head 24: Rebutting the presumption in fault-based offences and in no-fault (strict liability and absolute liability) offences**

Provide for:

(a) where the substantive offence is a fault based offence, the presumption placed upon the managerial agent by the reverse burden shall be

rebutted where he or she can demonstrate (to the satisfaction of the evidential burden) that he or she does not satisfy either:

- (i) the fault element of the offence which the prosecution would be required to prove, were the presumption not being relied upon, and, or in the alternative, as the case may be,
  - (ii) the contributory conduct aspect of the conduct element of the offence;
- (b) where the substantive offence is a strict or absolute liability offence, the presumption placed upon the managerial agent by the reverse burden shall be rebutted where he or she can demonstrate (to the satisfaction of the evidential burden) that he or she does not satisfy the contributory conduct aspect of the conduct element of the offence.

**Explanatory note.** Paragraph (a) implements recommendation R 9.18 that where the substantive offence is a fault based offence, the presumption placed upon the managerial agent by the reverse burden shall be rebutted where he or she can demonstrate that he or she does not satisfy either: (i) the fault element of the offence which the prosecution would be required to prove, were the presumption not being relied upon, and, or in the alternative, as the case may be, (ii) the contributory conduct aspect of the conduct element of the offence. Paragraph (b) implements recommendation R 9.19 that where the substantive offence is a strict or absolute liability offence, the presumption placed upon the managerial agent by the reverse burden shall be rebutted where he or she can demonstrate that he or she does not satisfy the contributory conduct aspect of the conduct element of the offence. Paragraphs (a) and (b) also implement recommendation R 9.20 that the presumption placed upon the managerial agent by the reverse burden will be rebutted where the relevant requirements are proved by the managerial agent to the satisfaction of the evidential burden.

## **Head 25: Effect of this Part on existing derivative liability provisions**

Provide for:

- (a) The provisions in this Part shall replace existing derivative liability provisions which are based on the managerial agent being liable on the basis of his or her “consent” or “connivance” or “neglect” or “wilful neglect” or a combination of any such terms where they occur in legislation;
- (b) The provisions in this Part shall replace existing secondary liability provisions which are based on the managerial agent being person who “aids, abets, counsels or procures” the primary offence, but only where:
  - (i) the primary offender is a corporate body (or other prescribed undertaking) and
  - (ii) the defendant is a natural person within the meaning of *Head 15*.

- (c) The provisions in this Part shall not apply to, or alter or affect, the application of the provisions of the Companies Act 2014 concerning the liability of an “officer in default”.

**Explanatory note.** Paragraph (a) implements recommendation R 9.21 that the derivative scheme in this Part shall replace existing “consent, connivance or neglect/wilful neglect” provisions where they occur in legislation. Paragraph (b) implements recommendation R 9.22 that the derivative scheme in this Part should replace existing “aids, abets, counsels or procures” models of secondary liability for managerial agents, but limited to those cases where (a) the primary offender is a corporate body (or other prescribed undertaking) and (b) the defendant is a natural person who falls within the meaning of *Head 15*. Paragraph (c) implements recommendation R 9.23 that the derivative scheme in this Part shall not apply to, alter or affect, the application of the officer in default provisions of the *Companies Act 2014*.

## Part 6 Defence of Due Diligence

### Head 26: Defence of due diligence or comparable defence applies to strict liability offences

Provide for:

- (a) Subject to the provisions of this Part, a defence of due diligence shall apply to strict liability offences;
- (b) Subject to the provisions of this Part, a defence by reference to offences involving “a failure to prevent” or comparable phrase may be provided for in a strict liability offence as an alternative to a due diligence defence, but only where it is not feasible to hold a corporate body or its managerial agents liable for a substantive offence.

**Explanatory note.** Paragraph (a) implements recommendations R 10.01, R 10.02 and R 10.03 that, having regard to the relevant constitutional provisions, a due diligence type defence should apply to strict liability offences; that the suitable use of strict liability offences is consistent with and can contribute to effective and efficient regulation; and that a due diligence defence is appropriate for the corporate liability attribution model recommended in Part 4, insofar as it applies to strict liability offences. Paragraph (b) implements recommendations R 10.04 and R 10.05 that a “failure to prevent” model should be available, on a case-by-case basis, as an alternative to a due diligence model for strict liability offences, but only where it is not feasible to hold a corporate body or its managerial agents liable for a substantive offence.

### Head 27: Form of defence of due diligence or comparable defence

Provide for:

- (a) the general form of a due diligence defence for a corporate body shall be that “the corporate body has taken all reasonable steps and has exercised all due diligence to prevent the relevant criminal offence”;
- (b) the general form of a due diligence defence for an individual shall be that “a relevant person has taken all reasonable steps and has exercised all due diligence to prevent the relevant criminal offence”.

**Explanatory note.** Paragraph (a) implements recommendation R 10.06 that the general form of a due diligence defence for a corporate body shall be that “the corporate body has taken all reasonable steps and has exercised all due diligence to prevent the relevant criminal offence”. Paragraph (b) implements recommendation R 10.07 that the general form of a due diligence defence for an individual shall be that “a relevant person has taken all reasonable steps and has exercised all due diligence to prevent the relevant criminal offence”.

#### **Head 28: Guidance from regulatory body on due diligence where applicable**

Provide for:

where a regulator has jurisdiction in connection with an offence to which a due diligence or comparable defence applies, the regulator shall provide guidance, which may take the form of a statutory code, setting out measures required to satisfy the due diligence or comparable defence.

**Explanatory note.** This implements recommendation R 10.08 that where a regulator has jurisdiction in connection with an offence to which a due diligence defence applies, the regulator should provide guidance, which may take the form of a statutory code, setting out measures required to satisfy the due diligence defence.

#### **Head 29: Meaning of “relevant person” for due diligence defence**

Provide for:

“relevant person”, in relation to a corporate body, means:

- (a) a director, manager, secretary or other officer of the corporate body,
- (b) a person purporting to act in that capacity,
- (c) a shadow director (within the meaning in the Companies Act 2014) of the corporate body, or
- (d) an employee, agent or subsidiary of the corporate body.

**Explanatory note.** This implements recommendation R 10.09 that “relevant person”, in relation to a corporate body, should be defined as: (1) a director, manager, secretary or other officer of the corporate body, (2) a person purporting to act in that capacity, (3) a shadow director (comparable to the definition in the Companies Act 2014) of the corporate body, or (4) an employee, agent or subsidiary of the corporate body.

**Head 30: Corporate liability where offence involves “failure to prevent”**

Provide for:

- (a) where a strict liability offence concerning a corporate body involves a “failure to prevent” offence, criminal liability may be imposed on the corporate body for either:
  - (i) cultural or organisational failures in a systems or policies of the corporate body which result in offending or
  - (ii) failures in supervision by any “relevant person” with policy making responsibilities within the management structure of the corporate body.
- (b) a corporate body shall be held liable for failures to prevent criminal activity only where such activity was carried out for the benefit of the corporate body or for the benefit of a “relevant person” or a client of the corporate body.

**Explanatory note.** Paragraph (a) implements recommendation R 10.10 that a “failure to prevent” model of liability should involve imposing criminal liability for both (a) cultural or organisational failings in a corporate body’s systems or policies which result in offending and (b) failures in supervision by any “relevant person” with policy making responsibilities within the corporate body’s managerial structure. Paragraph (b) implements recommendation R 10.11 that a corporate body should be held criminally liable for failures to prevent criminal activity only where such activity was carried out for the benefit of the corporate body or for the benefit of a “relevant person” or a client of the corporate body.

**Head 31: Due diligence defence applies to “relevant persons”**

Provide for:

- (a) the due diligence defence or comparable defence shall apply to a “relevant person” in respect of strict liability type offences;
- (b) the due diligence defence or comparable defence shall apply to a prosecution for derivative liability of a managerial agent in accordance with the provisions in *Part 5*, insofar as *Part 5* relates to a strict liability offence.

**Explanatory note.** Paragraph (a) implements recommendation R 10.12, that a due diligence type defence should be available to “relevant persons” for strict liability type offences. Paragraph (b) implements recommendation R 10.13, that a due diligence defence should apply to the scheme of derivative managerial agent liability provided for in *Part 5* of the Draft Scheme, insofar as it relates to strict liability offences.



## Part 7 Other Related Defences

### Head 32: Ignorance of law or reliance on legal advice not a general defence

Provide for:

- (a) Neither ignorance of the law nor reliance on legal advice shall operate as a general defence in criminal law, but without prejudice to such a defence being provided for in specific legislation.
- (b) Where there is evidence that a corporate body or, as the case may be, an individual has acted in good faith in reliance on legal advice obtained bona fide and as a result in the belief that the conduct concerned to be lawful in, such reliance on legal advice may be considered as a mitigating factor at sentencing.

**Explanatory note.** Paragraph (a) implements recommendation R 10.14 that it should remain the case that neither ignorance of the law nor reliance on legal advice should operate as a general defence in criminal law, but that this does not preclude such a defence being provided for in legislation on a case-by-case basis. Paragraph (b) implements recommendation R 10.15 that in circumstances in which there is evidence to indicate that an individual or corporate body acted in good faith and believed their conduct to be lawful in reliance on bona fide legal advice, such reliance on legal advice may be considered as a mitigating factor at sentencing.

### Head 33: Officially induced error, including advice from regulator

Provide for:

- (a) Where an instance of officially induced error, including such an error resulting from advice from a regulator, does not prevent the initiation of a criminal prosecution, it shall be open to the defendant to raise the instance of officially induced error during the trial, where the advice appears authoritative and reasonable, and where the corporate body or, as the case may be, the individual has in good faith sought to apply it within the law;
- (b) The trial court may make an order in the form provided for in Head 2(4) of the *Revised General Scheme of the Criminal Procedure Bill* where the defendant raises officially induced error during the course of the trial.

**Explanatory note.** Paragraph (a) implements recommendation R 10.16 that where an instance of officially induced error, including such an error resulting from advice from a regulator, does not prevent the initiation of a criminal prosecution, it should be open to the defendant to raise the instance of officially induced error during the trial, where the advice appears authoritative and reasonable, and where the individuals and corporations have in good faith sought to apply it within the law. Paragraph (b) implements recommendation R 10.17 that in order to facilitate the recognition of officially induced error during the course of a trial, where it did not result in a prohibition of the prosecution during a preliminary

hearing, the trial court may make an order in the form provided for in Head 2(4) of the *Revised General Scheme of the Criminal Procedure Bill* where the defendant raises officially induced error during the course of the trial.

**Head 34: Defence of duress or “superior orders”**

Provide for:

The defence of duress, including where raised by reference to “superior orders”, shall be available only where a threat of death or serious immediate harm is directed towards the defendant.

**Explanatory note.** This implements recommendation R 10.18, that the defence of duress or “superior orders” should be available only where a threat of death or serious immediate harm is directed towards any person. This is consistent with the Commission’s general analysis of the defence of duress in its *Report on Defences in Criminal Law* (LRC 95-2009).

**Head 35: Delegation of function in due diligence does not include delegation of liability of managerial agent**

Provide for:

Where a managerial agent delegates the function of exercising due diligence, the legal responsibility for exercising due diligence remains with the managerial agent.

**Explanatory note.** This implements recommendation R 10.19, that while a managerial agent may delegate the function of exercising due diligence, the legal responsibility for exercising due diligence may not be delegated as this remains with the managerial agent.

#### 4. Draft Scheme of Criminal Justice (Theft and Fraud Offences) (Amendment) Bill

##### CONTENTS

##### Head

1. Amendment of deception in section 2 of 2001 Act to include recklessness
2. Amendment of section 10 of 2001 Act (false accounting) to include recklessness
3. Amendment of section 11 of 2001 Act (suppression, etc., of documents) to include recklessness

#### Draft Scheme of Criminal Justice (Theft and Fraud Offences) (Amendment) Bill

##### DRAFT SCHEME OF BILL

##### entitled

An Act to amend the Criminal Justice (Theft and Fraud Offences) Act 2001 to provide for the inclusion of references to recklessness in that Act and to provide for related matters.

##### **General introductory note**

In Chapter 11 of the Report, the Commission considers whether it is appropriate to include specific references to recklessness (which has been defined in Irish case law as subjective recklessness) in the existing law on fraud and related offences, found primarily in the *Criminal Justice (Theft and Fraud Offences) Act 2001*. The Commission concludes and recommends that this is appropriate to address egregiously reckless risk-taking.

In Chapter 12, the Commission concludes that, in light of the recommendations in Chapter 11 that egregiously reckless risk-taking should be appropriately criminalised within the offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, a criminal offence of reckless trading should not be enacted in Ireland (recommendations R 12.01 and R 12.02).

The Commission also recommends that the common law offence of conspiracy to defraud should be retained (recommendation R 11.01). Related to this, the Commission also recommends that, since current Irish law (including the common law offence of conspiracy to defraud and the offences in the 2001 Act) already contains the essential elements of the US mail and wire fraud offences, such offences need not be introduced in Ireland (recommendation R 11.02).

The Commission also recommends that, subject to these amendments concerning recklessness, the 2001 Act (which has been used to prosecute and convict senior executives involved in fraud-related offences connected to the banking crisis that emerged in 2008), should be retained in its current form. This includes that the definition of dishonesty in the 2001 Act as acting “without a claim of right made in good faith” should be retained (recommendation R 11.04); and that the offence of unlawful use of a computer in section 9 of the 2001 Act should also be retained in its current form (recommendation R 11.05).

The provisions below of the Draft Scheme implement the recommendations in Chapter 11 on inserting references to recklessness into the 2001 Act.

**Head 1: Amendment of definition of deception in section 2 of 2001 Act to include recklessness**

Provide for:

Amend the definition of “deception” in section 2(2) of the Criminal Law (Theft and Fraud Offences) Act 2001 to include not only intentional behaviour but also recklessness (defined as subjective recklessness), and that it should therefore provide that for the purposes of that definition “a person deceives if he or she, intentionally or recklessly” engages in the acts subsequently referred to in the 2001 Act.

**Explanatory note.** This implements recommendation R 11.03, that the definition of “deception” in the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined in Irish case law as subjective recklessness), and that it should therefore provide that for the purposes of that definition “a person deceives if he or she, intentionally or recklessly” engages in the acts subsequently referred to in the 2001 Act.

**Head 2: Amendment of section 10 of 2001 Act (false accounting) to include recklessness**

Provide for:

Amend section 10(1) of the Criminal Law (Theft and Fraud Offences) Act 2001 to include not only intentional behaviour but also recklessness (defined as subjective recklessness), and that it should therefore provide as follows:

- “(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—
- (a) intentionally or recklessly destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose,
  - (b) intentionally or recklessly fails to make or complete any account or any such document, or
  - (c) in furnishing information for any purpose intentionally or recklessly produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.”

**Explanatory note.** This implements recommendation R 11.06, that the definition of the conduct element of the offence in section 10(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* (false accounting) should be amended to include not only intentional behaviour but also recklessness (which has been defined in Irish case law as subjective recklessness), and that it should therefore provide as follows:

- “(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another—
- (a) intentionally or recklessly destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose,
  - (b) intentionally or recklessly fails to make or complete any account or any such document, or
  - (c) in furnishing information for any purpose intentionally or recklessly produces or makes use of any account, or any such document, which to his or her knowledge is or may be misleading, false or deceptive in a material particular.”

### **Head 3: Amendment of section 11 of 2001 Act (suppression, etc., of documents) to include recklessness**

Provide for:

Amend section 11(1) of the Criminal Law (Theft and Fraud Offences) Act 2001 to include not only intentional behaviour but also recklessness (defined as subjective recklessness), and that it should therefore provide as follows:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, intentionally or recklessly destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.”

**Explanatory note.** This implements recommendation R 11.07, that the definition of the conduct element of the offence in section 11(1) of the *Criminal Law (Theft and Fraud Offences) Act 2001* should be amended to include not only intentional behaviour but also recklessness (which has been defined in Irish case law as subjective recklessness), and that it should therefore provide as follows:

“A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, intentionally or recklessly destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.”



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The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its Fourth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975